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CONTAINING THE

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SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

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OF THE SEVERAL STATES.

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By A. C. FREEMAN.

VOLUME 111.

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AMERICAN STATE REPORTS.

VOLUME 111.

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AMERICAN STATE REPORTS.

VOLUME 111.

(15)

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

TAGERT v. STATE.

[143 Ala. 88, 39 South. 293.]

INCEST With Daughter of Deceased Wife.—Under a statute defining incest as the intermarriage of, or sexual intercourse between, persons within the degrees of consanguinity or relationship within which marriages are declared by law to be incestuous and void, with knowledge of such consanguinity or relationship, and another statute declaring that no man shall marry the daughter of his wife, sexual intercourse between a man and the daughter of his deceased wife, while there is living issue of the marriage, constitutes the crime of incest. (p. 18.)

RELATIONSHIP by Affinity.—After the death of a wife, living issue of the marriage continues the affinity between her husband and her blood relations. (pp. 18, 19.)

EVIDENCE—Facial Expressions of Accused.—Witnesses are competent to testify that the accused at a certain time appeared angry, surprised, or otherwise. (p. 19.)

EVIDENCE—Contents of Lost Letters.—A witness is incompetent to state the contents of a lost letter which has been in his possession, on his mere statement that it has been lost, misplaced, or destroyed, but that it was not among certain letters destroyed by him, and that no search has been made for it among those not thus destroyed. (p. 19.)

Dill & Allen, for the appellant.

M. Wilson, attorney general, for the state.

[90] TYSON, J. "Incest," says Mr. Bishop, "where the statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between persons too nearly related in consanguinity or affinity to be [91] entitled to intermarry": Bishop on Statutory Crimes, sec. 727.

Section 4889 of the Criminal Code reads as follows: "If any man or woman, being within the degrees of consanguinity or relationship within which marriages are declared by law to be incestuous and void, and knowing of such consanguinity or relationship, intermarry, or have sexual intercourse together, or live together in adultery, each of them must, on conviction, be imprisoned in the penitentiary for not less than one, nor more than seven, years."

The degrees of consanguinity or relationship within which marriages are declared incestuous are fixed by section 2837 of the Civil Code. One of these degrees is, as known in common parlance, that of stepfather and stepdaughter. The language is that "No man shall marry the daughter of his wife."

It cannot be seriously doubted that the relation of consanguinity or affinity between the parties must exist at the time the act of intermarrying or sexual intercourse occurs. If the relationship, previous to the act of marrying or sexual commerce takes place, has ceased to exist, then the act of intermarrying or sexual intercourse is not incestuous, however offensive it may appear to good morals or punishable as a crime under other criminal statutes.

In the present case it appears that, at the time of the sexual act or acts between the defendant and the woman, Maud Alice Freeland, the mother of Maud was dead. That, at the date of her death, she was the wife of defendant and left surviving her a child or children, issue of their marriage, who are now living. The point is made that, upon the death of the wife and mother, the relation of affinity between defendant and Maud was dissolved.

It must be admitted that the case of Johnson v. State, 20 Tex. App. 609, 54 Am. Rep. 535, which arose under statutes very similar to ours, fully sustains the contention. In that case, as here, it appeared that issue of the marriage survived the wife and were living at the time the sexual intercourse was had between the stepfather and his stepdaughter. 92 But the court either overlooked this fact or regarded it as of no importance.

Since the decision of Mounson v. West, 1 Leon. 88, by the court of common pleas of England, during the reign of Elizabeth, it has been regarded as settled by some of the ablest courts in this country that, after the death of the wife, living issue of the marriage continues the affinity between the husband and her blood relations: Jaques v. Commonwealth, 10

Gratt. 690; Dearmond v. Dearmond, 10 Ind. 191; Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144. See, also, cases collected in note to Chinn v. State, 41 Ohio St. 575, 26 N. E. 986, 11 L. R. A. 630.

This principle was recognized by this court in Pegnes v. Baker, 110 Ala. 251, 17 South. 943.

It must be now regarded as finally settled by this court that a witness may testify that the accused appeared to be angry or surprised: Hainsworth v. State, 136 Ala. 13, 34 South. 203; Thornton v. State, 113 Ala. 43, 59 Am. St. Rep. 97, 21 South. 356. It is true this is an affirmative statement by the witness of the facial expression of the accused as it appeared to him, but there is no good reason why the negative of the proposition may not be testified to, when the circumstances are such as would naturally produce anger or surprise and no sign or indication of either is shown by the accused. The question propounded to Dr. Baker, under the circumstances shown by him, was competent. So, also, was that portion of his answer responsive to the question competent and legal. If it be conceded that the other part of his answer, which was not responsive to the question, was incompetent, the motion to exclude the whole of his answer was not the proper way to eliminate it: Davis v. State, 131 Ala. 10, 31 South. 569.

The objection to the question propounded to witness Griffin, calling for the contents of the note, on the ground that its loss or absence had not been sufficiently proven or accounted for to allow secondary evidence of its contents, should have been sustained. Non constat, this paper was not among those that had been destroyed by the witness—no search being made for it among those not destroyed. There is no merit in the other objections to this testimony.

93 The question to Mrs. Hill to which objection was sustained was clearly not competent.

Reversed and remanded.

McClellan, C. J., Simpson and Anderson, JJ., concurring.

CRIME OF INCEST.

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VIII. Admissibility of Evidence, 29.

I. Nature of Crime, Generally.

Incest was not an offense indictable or punishable by the common law, although it was according to the canon law: State v. Smith, 30 La. Ann. 846; State v. Keesler, 78 N. C. 469; Tuberville v. State, 4 Tex. 128. We feel safe in affirming that every state in the American Union has a statute defining incest and making it a crime. Incest consists, generally, under such statutes, in sexual commerce or intercourse, either habitual, or in a single instance, either under form of marriage or without it, between persons too nearly related in consanguinity or by affinity to be entitled to intermarry: State v. Herges, 55 Minn. 464, 57 N. W. 205; State v. Slaughter, 70 Mo. 484; Territory v. Corbett, 3 Mont. 50; State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 23 N. E. 747.

In Oregon it is maintained that rape by forcible ravishment and incest cannot be committed by the same act, as incest is accomplished by the concurring assent of two persons, while rape is committed through the impelling will of one, and that as rape and incest are two distinct crimes, evidence of the violence used is not admissible under an indictment charging the crime of incest alone: State v. Jarvis, 20 Or. 437, 23 Am. St. Rep. 141, 26 Pac. 302. And in Missouri the rule is maintained that the crime of rape is of a higher nature than that of incest, and that upon an indictment for incest the defendant cannot be convicted where the evidence proves the commission of a rape: State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321; State v. Eding, 141 Mo. 281, 42 S. W. 935. This doctrine, however, is opposed to sound reasoning and the great weight of authority. It is a general rule of criminal law that the greater crime always includes the less, and this is the rule in regard to incest committed by force, as adopted in a majority of the cases which maintain that every element of the crime of incest may exist as against one party to the sexual act, though the other did not consent thereto, and though the act was accomplished by the man by the use of such force and coercion as would render him also guilty of rape. The crime of incest is included in the crime of rape, and one accused of incest cannot escape conviction on the ground that the act committed also constituted the crime of rape: Smith v. State, 108 Ala. 1, 54 Am. St. Rep. 140, 19 South. 306; People v. Kaiser, 119 Cal. 456, 51 Pac. 702; State v. Chambers, 87 Iowa, 1, 43 Am. St

Rep. 349, 53 N. W. 1090; State v. Hurd, 101 Iowa, 391, 70 N. W. 613; State v. Konhus, 103 Iowa, 720, 73 N. W. 353. The act of an attempt to commit incest may be committed, though the female upon whom the attempt was made did not consent, but resisted with force: People v. Gleason, 99 Cal. 359, 37 Am. St. Rep. 56, 33 Pac. 1111.

II. Relationship.

a. Consanguinity.

1. Illegitimate Relatives.—Legitimacy of the relationship between the parties is not essential to the commission of the crime of incest: State v. Schannhurst, 34 Iowa, 547. Thus, the crime may be committed by the illegitimate children of the same parents: State v. Schannhurst, 34 Iowa, 547. Adultery committed with a natural daughter is incest equally as if she were born in lawful wedlock: Morgan v. State, 11 Ala. 289; Baker v. State, 30 Ala. 521. The crime of incest may be committed by a father with his illegitimate daughter: Brown v. State, 42 Fla. 184, 27 South. 869; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672; People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146; State v. Laurence, 65 N. C. 659. And, generally, the crime of incest may be committed between illegitimate relatives of any kind, within the degree of relationship, in which they are prohibited from marrying: Clark v. State, 39 Tex. Cr. Rep. 179, 73 Am. St. Rep. 918, 45 S. W. 576.

2. Legitimate Relatives.—A married man who has criminal intercourse with his own daughter, she being a single woman, is guilty of incestuous adultery, and she of incestuous fornication: Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Commonwealth v. Buice, 4 Clark (Pa.), 14.

Illicit sexual intercourse between first cousins may by statute be made to constitute incest: Naturis v. State, 64 Ark. 467, 43 S. W. 369. But a marriage between an uncle and his niece of statutory age, neither of whom is disqualified by any statutory law, is not incestuous, and cannot be deemed so in the administration of either the civil or criminal law: Weisburg v. Weisburg (App. Div.), 98 N. Y. Supp. 260.

Marriages between persons within the prohibited degrees of consanguinity are equally unlawful, and sexual intercourse between them is incestuous, whether they or their parents are of the whole or only of the half blood: People v. Jenness, 5 Mich. 305; Territory v. Corbett, 3 Mont. 50. If marriage between a man and the daughter of his half-brother is prohibited by statute, their lewd and lascivious cohabitation with each other is punishable as incest: State v. Reedy, 44 Kan. 190, 24 Pac. 66. The term "sister," as used in statutes defining incest, includes half-sister, and if such statutes make it incest for a man to have sexual intercourse with the daughter of his sister, they will sustain his conviction on a charge of such intercourse with a daughter of his half-sister: Shelly v. State, 95

Tenn. 152, 49 Am. St. Rep. 926, 31 S. W. 492. A man may commit the crime of incest in having sexual intercourse with the daughter of his half-brother: State v. Ginton, 51 La. Ann. 155, 24 South. 784. The word "brother," as used in statutes defining incest, includes a brother of the half blood: State v. Wyman, 59 Vt. 527, 59 Am. Rep. 753, 8 Atl. 900.

b. **Relationship by Affinity.**—Cohabitation by a man with his stepdaughter is not incestuous under the law of Mississippi, because the statute in naming the prohibited degrees of relationship, uses the word "consanguinity" and omits "affinity": Chancellor v. State, 47 Miss. 278. On the other hand, sexual intercourse between a man and his stepdaughter constitutes incest in Georgia and Texas: Taylor v. State, 110 Ga. 150, 35 S. E. 161; McGrew v. State, 13 Tex. App. 340; but in a prosecution for incest based upon the carnal intercourse of stepfather and stepdaughter, there must be presented, in order to secure a valid conviction, affirmative evidence of the legal marriage of the former with the mother of the latter, and that, at the time of such second marriage, the first had been dissolved, either by death or legal divorce: McGrew v. State, 13 Tex. App. 340.

A husband is not related by affinity to his wife's brother's wife, and sexual intercourse between them, though immoral, does not constitute the crime of incest: Chinn v. State, 47 Ohio St. 575, 26 N. E. 986, 11 L. R. A. 630.

The relation of stepfather and stepdaughter, within the meaning of statutes against incest, generally speaking, does not exist after the termination of the marriage relation between the stepfather and the stepdaughter's mother. Hence after the termination of such relation, sexual intercourse between a man and his stepdaughter does not constitute the crime of incest: Noble v. State, 22 Ohio St. 541; Johnson v. State, 20 Tex. App. 609, 54 Am. Rep. 535. The crime of begetting an illegitimate child on the body of a wife's sister cannot be committed after the death of such wife. After her death the surviving husband and the sister of the deceased wife are, in contemplation of law, strangers: Wilson v. State, 100 Tenn. 596, 66 Am. St. Rep. 789, 46 S. W. 451.

In the absence of statutory declaration, illicit intercourse between a man and his wife's sister is not incestuous: Dukes v. Clark, 2 Blackf. 20. But a brother in law and a sister in law are within the meaning of statutes prescribing the punishment for incest, nearer of kin, by affinity, than cousins, and therefore they may be guilty of such crime: Stewart v. State, 39 Ohio St. 152. It has been held that, if the statute provides that "if the brother hath married or shall marry his brother's wife, the marriage shall be dissolved and the parties fined," the marrying a brother's widow is an incestuous offense within the meaning of the statute: Commonwealth v. Perryman, 2 Leigh, 717.

c. **Knowledge of Relationship** existing between the parties to the illicit sexual intercourse, at least on the part of the person accused and on trial, is essential to create the crime of incest: Lumpkins v. Justice, 1 Ind. 557; Griggs v. Vickroy, 12 Ind. 549. In incest, one person having knowledge and the other being ignorant of the relationship existing between them, the former may be convicted and the latter acquitted: State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321. In an indictment for incest it is unnecessary to charge a common knowledge of the relationship, if the charge of knowing of the relationship is made against the person indicted: Morgan v. State, 11 Ala. 289; and under some statutes it is not necessary to allege in an indictment charging incest that the accused had knowledge of the relationship existing between himself and the particeps criminis: State v. Wyman, 59 Vt. 527, 59 Am. Rep. 753, 8 Atl. 900; State v. Dana, 59 Vt. 614, 10 Atl. 727. But where the statute defines incest as having sexual intercourse between certain persons "having knowledge of their relationship," the knowledge of both persons to the act is necessary to constitute the crime, and an indictment charging but one of such persons with having committed the act with knowledge of such relationship is fatally defective: Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691.

d. **Proof of Relationship.**—The admissions of one charged with the crime of incest are competent evidence of the relationship alleged to exist between him and the person with whom the offense is alleged to have been committed, and such admissions, if believed to be true by the jury, are sufficient evidence of relationship to sustain a finding as to that fact: Brown v. State, 42 Fla. 184, 27 South. 839. A declaration by a father that the person with whom he is charged with having committed incest is his illegitimate daughter, is admissible in evidence against him: Morgan v. State, 11 Ala. 289. Reputation is sufficient evidence of the relationship between the parties to the indictment: Ewell v. State, 6 Yerg. 364, 27 Am. Dec. 480. The admission of a father is competent to show that the person with whom he had sexual intercourse was his daughter: Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672.

The relationship of the parties may be established by their admissions, acts, and declarations, the identity of the names, and by the absence of evidence that there are other persons by the same names: State v. Schannhurst, 34 Iowa, 547.

III. Sexual Intercourse.

A single act of sexual intercourse between persons related by blood or affinity within prohibited degrees constitutes incest: Mathis v. Commonwealth (Ky.), 13 S. W. 360; Barnhouse v. State, 31 Ohio St. 39; State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 23 N. E. 747. The intermarriage of persons within the degrees of consanguinity forbidden by the statute constitutes the crime of in-

cest, and to sustain a conviction it is not essential for the state to show in addition to the marriage carnal knowledge between the parties: State v. Schannhurst, 34 Iowa, 547. Emission is an essential ingredient in the crime of incest, although the statute uses the words "sexual intercourse" instead of "carnal knowledge" employed in the law against rape: Noble v. State, 22 Ohio St. 541.

IV. Consent.

Although the authorities are conflicting, the better rule, and the one supported by the weight of authority, is that consent of the female is not essential to constitute the crime of incest in the male: David v. People, 204 Ill. 479, 68 N. E. 540. And that the crime of incest may be committed by one party to the act without the consenting mind of the other: People v. Barnes, 2 Idaho, 161, 9 Pac. 532. In other words, the true rule is, we take it, that if a male person and a female person, being within the degree of consanguinity or affinity within which their marriage is prohibited by law, have sexual intercourse with each other, he is guilty of incest, whether such intercourse was had with or without her consent, as mutual consent to, or participation of both parties in, the act is not necessary in order to constitute the crime of incest: People v. Stratton, 141 Cal. 604, 75 Pac. 166; Smith v. State, 108 Ala. 1, 54 Am. St. Rep. 140, 19 South. 306; Norton v. State, 106 Ind. 163, 6 N. E. 126; State v. Ellis, 11 Mo. App. 588; State v. Nugent, 20 Wash. 522, 72 Am. St. Rep. 133, 56 Pac. 25; Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061; Schoenfeldt v. State, 30 Tex. App. 695, 18 S. W. 640. The question of the consent of the female does not necessarily enter into the composition of the offense of incest, but a prosecution for that offense can be maintained upon proof that establishes either her consent or nonconsent to the carnal intercourse: Mercer v. State, 17 Tex. App. 452. In the crime of incest there may be a certain force or power exerted, resulting from the age, relationship or circumstances of the parties, which overcomes the objections of the female without amounting to that violence which would constitute rape: Raiford v. State, 68 Ga. 672; and one accused of rape cannot escape conviction on the ground that the female upon whom the crime was committed did not consent thereto, or was of such an age that she was not at the time capable of giving her consent: State v. Chambers, 87 Iowa, 1, 43 Am. St. Rep. 349, 53 N. W. 1090.

In determining the consent or nonconsent of the woman, upon the trial of a man for an attempt to commit incest with her, the jury is not restricted to a consideration of her testimony alone, but have a right to consider all the surrounding circumstances: State v. McGilvery, 20 Wash. 240, 55 Pac. 115.

The intent of a father to commit incest with his daughter, and his concurrent overt act in the use of means adapted to the imme-

diate perpetration of and consummation thereof, by an attempt to have carnal connection with her, lacking only penetration to complete the act, are sufficient to constitute a criminal attempt to commit incest, and the fact that such attempt was without the consent and against the active resistance of the daughter, and therefore not successful, does not preclude him from conviction of the crime of attempting to commit incest: People v. Gleason, 99 Cal. 359, 37 Am. St. Rep. 56, 33 Pac. 1111.

In opposition to the rule of the above case there is a respectable line of cases which maintain that the crime of incest can be committed only when both persons voluntarily consent to the illicit act of carnal intercourse, that the consent of both parties to the connection is necessary to constitute the crime, and that it must be their joint act. These cases necessarily maintain that if force is used, the crime is rape, and not incest, and that rape by forcible ravishment and incest cannot be committed by the same act, because incest is accomplished by the concurring assent of two persons, while rape is committed through the impelling will and force of one: State v. Thomas, 53 Iowa, 214, 4 N. W. 908; Commonwealth v. Goodhue, 2 Met. 193; People v. Jenness, 5 Mich. 305; De Groat v. People, 39 Mich. 124; People v. Burwell, 106 Mich. 27, 63 N. W. 986; People v. Harnden, 1 Park. C. C. 344; State v. Jarvis, 20 Or. 437, 23 Am. St. Rep. 141, 26 Pac. 302.

We adhere to the opinion, however, that the better rule is that stated by Mr. Justice Buck, in People v. Barnes, 2 Idaho, 161, 9 Pac. 582, that: "We have been unable to find any definition of that term [incest] in the common-law authorities which necessarily implies a consenting mind in both parties. It is maintained that the words 'with each other,' used in the statutes, imply that the offense is committed only when both participants therein do so with a willing mind. Many of the adjudicated cases sustaining this theory seem to be founded upon such a construction of the language used. We are unable to adopt this construction. We are rather of the opinion that the better reason is found with the opposite authorities, which hold that neither the language of the statute nor the true definition of the terms employed, imply that a mutuality of consent is necessary to constitute the crime of incest."

V. Defenses.

Voluntary drunkenness can neither excuse nor palliate the crime of incest: Colee v. State, 75 Ind. 511. Proof that the female had been guilty of improper relations with other men than the defendant is no defense to a charge of incest: State v. De Hart, 109 La. Ann. 570, 33 South. 605; State v. Winningham, 124 Mo. 423, 27 S. W. 1107; Kilpatrick v. State, 39 Tex. Cr. Rep. 10, 44 S. W. 830; Richardson v. State, 44 Tex. Cr. Rep. 211, 70 S. W. 320.

VI. Accomplice and Corroboration.

It is an almost universal rule that a woman who consents to the crime of incest knowingly, voluntarily and with the same intent which actuates the man, is his accomplice, and that he cannot be convicted on her uncorroborated testimony: Solomon v. State, 113 Ga. 192, 38 S. E. 332; Yother v. State, 120 Ga. 204, 47 S. E. 555; Durden v. State, 120 Ga. 860, 48 S. E. 315; Whidby v. State, 121 Ga. 588, 49 S. E. 811; State v. Jarvis, 18 Or. 360, 23 Pac. 251; State v. Jarvis, 20 Or. 137, 23 Am. St. Rep. 141, 26 Pac. 302: Shelly v. State, 95 Tenn. 152, 49 Am. St. Rep. 926, 31 S. W. 492; Freeman v. State, 11 Tex. App. 92, 40 Am. Rep. 787; Mercer v. State, 17 Tex. App. 452; Dodson v. State, 24 Tex. App. 514, 6 S. W. 548; Blanchette v. State, 29 Tex. App. 46, 14 S. W. 392; Ratliff v. State (Tex. Cr. Rep.), 60 S. W. 666; Tate v. State (Tex. Cr. Rep.), 77 S. W. 792.

The testimony of the prosecutrix in a prosecution for incest, to the effect that she submitted to the defendant's embraces at intervals for several months, without objection or making complaint, sufficiently shows her to have been an accomplice, though she denies that she engaged in the intercourse with the same purpose as defendant, or that she was either desirous or willing to engage in it, and her testimony must be corroborated in order to sustain a conviction: Clifton v. State, 46 Tex. Cr. Rep. 18, 108 Am. St. Rep. 983, 79 S. W. 824.

Although it is conceded that the prosecutrix was an accomplice, her testimony is sufficiently corroborated by the fact that as soon as her child was born, defendant separated from his wife and family on account of that fact, and the further fact that, when sought by his wife's relatives for an explanation of his conduct, he admitted his guilt: Schoenfeldt v. State, 30 Tex. App. 695, 18 S. W. 640. And the testimony of the prosecutrix in a prosecution for incest is sufficiently corroborated by evidence that she was pregnant, and that her brother, who was the defendant, alone had opportunity for intercourse with her: Jackson v. State (Tex. Cr. Rep.), 40 S. W. 998. The prosecuting witness is sufficiently corroborated, when the defendant testifies in his own behalf, that, "I don't think that I did such a thing; I might have done it in my sleep": Bales v. State (Tex. Cr. Rep.), 44 S. W. 517.

Authority is not wanting to sustain the proposition that under an indictment for incest committed by the defendant with his daughter, a conviction may be sustained upon the testimony of the daughter alone, as she is incapable of consenting to the act and cannot be regarded as an accomplice: Whittaker v. Commonwealth, 95 Ky. 632, 27 S. W. 83.

If the evidence shows that, in the commission of the incestuous act, she was the victim of force, threats, fraud or undue influence, so that she did not act voluntarily and willingly join in the commission of the act, she is not an accomplice, and a conviction may

be sustained even upon her uncorroborated testimony: Smith v. State, 108 Ala. 1, 54 Am. St. Rep. 140, 19 South. 306; People v. Stratton, 141 Cal. 604, 75 Pac. 166; Schwartz v. State, 65 Neb. 196, 91 N. W. 190; Shelly v. State, 95 Tenn. 152, 49 Am. St. Rep. 926, 31 S. W. 492; Mercer v. State, 17 Tex. App. 452.

VII. Indictment.

The fact that the crime of incest may be a joint offense does not preclude an indictment or information against one of the persons guilty thereof and his legal conviction for the offense: People v. Patterson, 102 Cal. 239, 36 Pac. 436; Powers v. State, 44 Ga. 209; Yeoman v. State, 21 Neb. 171, 31 N. W. 669; Lowther v. State, 4 Ohio C. C. 522.

It has been held that an indictment for incest charging its commission on a day certain, and on divers other days and times, is sufficiently specific as to time, and that the continuando may be rejected as surplusage: Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; and, on the other hand, directly the opposite rule is maintained in State v. Temple, 38 Vt. 37.

As a general rule, an indictment for incest need not allege a knowledge of their relationship by the parties to the act: State v. Bullinger, 54 Mo. 142; Simon v. State, 31 Tex. Cr. Rep. 186, 37 Am St. Rep. 802, 20 S. W. 399; State v. Wyman, 59 Vt. 527, 59 Am. Rep. 753, 8 Atl. 900; State v. Pennington, 41 W. Va. 599, 23 S. E. 918. An information for incest committed by a father with his daughter need not affirmatively charge that at the time of the alleged act of incestuous intercourse the defendant knew that the prosecutrix was his daughter: People v. Koller, 142 Cal. 621, 76 Pac. 500. Under a statute specially providing that if certain persons shall have sexual intercourse together, "knowing of their relationship," etc., it has been held that the knowledge of both parties was necessary to constitute the crime, and that an indictment charging but one of the parties with having committed the act with such knowledge is fatally defective: Williams v. State, 2 Ind. 439; Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691.

An indictment for incest alleging that the act was done on the person of B., the said B. then and there being the daughter of the defendant, sufficiently avers the relationship of the parties: Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672. And an information for incest charging the crime to have been committed with the daughter of the defendant is sufficient to show the relationship between them without alleging that they are within the prohibited degrees of consanguinity: Hicks v. People, 10 Mich. 395. And in such case it is immaterial by what name the daughter is called in the indictment if her identity is thereby established as the daughter of defendant: Mathis v. Commonwealth (Ky.), 17 S. W. 360.

An indictment for incest with one's stepdaughter sufficiently describes the relationship of the parties by alleging it to be that of

stepfather and stepdaughter, without setting forth the marriage of the defendant to the mother, or the subsistence of the marriage relation at the time of committing the crime: Noble v. State, 22 Ohio St. 541. An indictment alleging the commission of the sexual act by uncle and niece is sufficient, without a direct averment that the relationship is nearer than that between cousins, or that they were related by blood or affinity: State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 23 N. E. 747.

An indictment charging that the defendant at a certain time and place upon the person of C. K., the daughter of said defendant, did commit fornication and have sexual intercourse with and carnally know the said C. K., sufficiently shows that the offense was committed upon an immediate female descendant of the defendant, and not upon an adopted daughter, or a stepdaughter or a daughter in law: People v. Kaiser, 119 Cal. 456, 51 Pac. 702.

An indictment charging that the defendant had carnal knowledge of his daughter is sufficient, though it does not charge that the parties had carnal knowledge of each other: State v. Hurd, 101 Iowa, 391, 70 N. W. 613. An indictment for incest charging carnal knowledge on the part of the accused only is sufficient: State v. Kimble, 104 Iowa, 19, 73 N. W. 348.

An allegation in the indictment that the defendant did commit fornication with a person named in describing the offense is an allegation of illicit intercourse, and sufficient as an averment that he had carnal knowledge of the person of the particeps, who is named in the indictment as defendant's brother's daughter: State v. Dana, 59 Vt. 614, 10 Atl. 727.

If the indictment alleges that the accused is the father of one F. W., and that he had carnal knowledge of said F. W., it is not necessary to further allege that the said F. W. is a female: Waggoner v. State, 35 Tex. Cr. Rep. 199, 32 S. W. 896.

An indictment of a father for incest committed by adultery with his daughter is defective if it fails to allege that the father was at the time a married man: Martin v. State, 58 Ark. 3, 22 S. W. 840. But an indictment alleging that the defendant did incestuously and adulterously have carnal knowledge of the body of a person named, being a married man and the father of the person named, sufficiently alleges that he was a married man at the time that the crime was committed: State v. Ratcliffe, 61 Ark. 62, 31 S. W. 978; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. And the indictment in such case need not further state that the daughter was the legitimate daughter of the defendant, of the whole blood by her mother to whom he was legally married at the time: Cook v. State, 11 Ga. 53, 56 Am. Dec. 410.

An indictment for incest must allege that the criminal act was feloniously done: Newman v. State, 69 Miss. 393, 10 South. 580. But it need not allege the knowledge of the female of the relationship,

but only such knowledge on the part of the defendant: State v. McGilvery, 20 Wash. 240, 55 Pac. 115.

It has been held that an indictment charging incest must allege that the act charged was the joint act of both parties: State v. Jarvis, 20 Or. 437, 23 Am. St. Rep. 141, 26 Pac. 302. But it has also been held that an indictment which charges the man with incestuously intermarrying with the woman, naming them, is sufficiently certain to charge her, as well as him, without alleging the converse proposition: Hutchins v. Commonwealth, 2 Va. Cas. 331.

An indictment for incest charging the woman named to be the daughter of defendant's brother is not bad because it does not give the name of such brother: State v. Pennington, 41 W. Va. 599, 23 S. E. 918.

An indictment for incest which charges the criminal act to have been committed continuously throughout a period of years is to be regarded as charging several distinct offenses, and is bad for duplicity: Barnhouse v. State, 31 Ohio St. 39. Such an indictment is not defective in alleging that the accused did "unlawfully intermarry," and in failing to allege affirmatively that there was a marriage, nor is it defective in failing to charge that the accused knowingly entered into an unlawful marriage, unless the statute employs the word "knowingly": Simon v. State, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399.

VIII. Admissibility of Evidence.

On a trial for incest after the introduction of evidence of the incestuous intercourse, evidence of prior acts of indecent familiarity and sexual connection between them is competent for corroboration of the specific act charged: People v. Patterson, 102 Cal. 239, 36 Pac. 436; State v. Markins, 95 Ind. 464, 48 Am. Rep. 733; Lofforge v. State, 129 Ind. 551, 29 N. E. 34; State v. De Hart, 109 La. 570, 33 South. 605; People v. Jenness, 5 Mich. 305; People v. Cease, 80 Mich. 576, 45 N. W. 585; People v. Skutt, 96 Mich. 449, 56 N. W. 11; Commonwealth v. Bell, 166 Pa. St. 405, 31 Atl. 123; State v. De Masters, 15 S. Dak. 581, 90 N. W. 852; State v. Wood, 33 Wash. 290, 74 Pac. 380. Evidence of previous acts of the female with other men, however, is irrelevant and inadmissible: State v. De Hart, 109 La. 570, 33 South. 605; Kilpatrick v. State, 39 Tex. Cr. Rep. 10, 44 S. W. 830.

In Lovell v. State, 12 Ind. 18, it was held that where the indictment contains a single charge of incest, which is proved as laid, the state cannot prove that the defendant had sexual intercourse with the prosecuting witness at any subsequent time. This, however, is contrary to the well-established rule that where a particular incestuous act is selected as the basis of prosecution, evidence both of prior and subsequent incestuous acts not too remote in time, when tending to show a continuous illicit relationship between the parties, is admissible as evidence of an incestuous disposition, and as corroboration

of testimony, introduced to prove the specific act charged: People v. Koller, 142 Cal. 621, 76 Pac. 500; Mathis v. Commonwealth (Ky.), 13 S. W. 360; Burnett v. State, 32 Tex. Cr. Rep. 86, 22 S. W. 47.

Upon the trial of a defendant for having committed incest with his daughter, it is error for the court to admit testimony by the prosecution tending to show that prior to the commission of the crime charged, the daughter was living as a prostitute with her mother, and was giving to her father the earnings of her shame: People v. Benoit, 97 Cal. 249, 31 Pac. 1128. Upon such a trial evidence impeaching the reputation of the prosecuting witness for chastity is inadmissible: Kidwell v. State, 63 Ind. 384. And declarations of the prosecuting witness that she had become pregnant by sexual intercourse with another than the defendant, are not admissible: Kidwell v. State, 63 Ind. 384. Or evidence that the daughter of the defendant, who was the prosecuting witness, had had sexual intercourse with another person is inadmissible: People v. Stratton, 141 Cal. 604, 75 Pac. 166; Mathis v. Commonwealth (Ky.), 13 S. W. 360. But she may testify that she never had sexual intercourse with any man except the accused: Taylor v. State, 110 Ga. 150, 35 S. E. 161.

Evidence of the sexual crimes of the defendant on trial for incest, with other persons subsequently to the crime charged, is incompetent: Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061. On such trial the defendant is entitled to prove that his reputation for gentlemanly deportment and moral character is good: Poyner v. State, (Tex. Cr. Rep.), 48 S. W. 516.

Under an indictment for incest alleged to have been committed by the defendant with his illegitimate daughter, his declarations are not admissible to show his marriage to the mother of such daughter: State v. Roswell, 6 Conn. 446.

Evidence that the prosecutrix had received money from a man with whom it is not shown that she had improper relations is immaterial and inadmissible. State v. Miller, 65 Iowa, 60, 21 N. W. 181.

If a man is indicted for marrying his half-niece, declarations of his mother that he is illegitimate and therefore not of kin to his niece are not admissible either to show that he married in good faith, when it is not shown that such declarations were made known to the defendant until about the time of his marriage, nor to rebut the family belief that had existed from his birth of his legitimacy, nor to rebut the presumption that children born in lawful wedlock are legitimate: Simon v. State, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399.

If one is accused of incest with his illegitimate daughter, and her mother is dead, the paternity of the female can be shown by the best evidence of which the nature of the case will admit: People v. Lake, 10 N. Y. St. Rep. 381. But the evidence of the relationship of the parties must be clear and unequivocal: Clark v. State, 39 Tex. Cr. Rep. 179, 73 Am. St. Rep. 918, 45 S. W. 576.

Generally, in a prosecution of a father for incest with his daughter, evidence of his cruel treatment of her for the purpose of forcing her to submit to his embraces is admissible: People v. Stratton, 141 Cal. 604, 75 Pac. 166; Clements v. State, 34 Tex. Cr. Rep. 616, 31 S. W. 642.

But on the other hand, it has also been held that evidence as to violence used to coerce copulation, or in the commission of the crime of incest, is inadmissible under an indictment charging incest and not rape: State v. Jarvis, 20 Or. 437, 23 Am. St. Rep. 141, 26 Pac. 302.

On a trial for incestuous adultery evidence tending to show acts and declarations of the accused manifesting solicitude as to the pregnancy of the woman, and also implicating him as the author of her ruin, is not only admissible, but may amount to sufficient corroboration of her testimony to authorize his conviction: Taylor v. State, 110 Ga. 150, 35 S. E. 161. But on the trial of a father for incest with his daughter, it is not competent for the state to show that, soon after the intercourse commenced, the daughter consulted a physician, who found her suffering from some irritation of the vagina resulting from recent violence: State v. Jarvis, 20 Or. 437, 23 Am. St. Rep. 141, 26 Pac. 302.

Evidence that the defendant denied prosecutrix the privilege of going to church and entertainments is admissible, in connection with evidence that his denial was based on his wrongful desire: Commonwealth v. Bell, 166 Pa. St. 405, 31 Atl. 123. The testimony of a physician who attended the prosecutrix at the time of the birth of her child, that he saw it several times during the six weeks that it lived, and that, in his opinion, the child favored the defendant in looks is not admissible: Kilpatrick v. State, 39 Tex. Cr. Rep. 10, 44 S. W. 830.

INGRAM v. INGRAM.

[143 Ala. 129, 42 South. 24.]

JUDGMENT OF DIVORCE in Another State—Collateral Attack.—A decree of divorce rendered in one state may be impeached collaterally in the courts of another state, by proof that the court granting the divorce had no jurisdiction, notwithstanding recitals in the decree to the contrary. (p. 32.)

JURISDICTION—Courts of Other States—Fraudulent Acknowledgment of Service.—Acknowledgment of service of process in a suit for divorce, instituted in one state against a resident of another, is insufficient to confer jurisdiction when such acknowledgment was made in ignorance of its purport, and was procured by fraud and deception. (p. 32.)

W. A. Young, for the appellants.

Nesmith & Nesmith, for the appellees.

[129] SIMPSON, J. The bill in this case was filed by Mary J. Ingram against her husband, M. W. Ingram, and his father and mother, and prayed for a divorce, alimony, custody of their two children, and the subjection of certain lands to her claim, which it is alleged were conveyed by her said husband on the eve of marriage in fraud of her marital rights.

[130] The answer, besides a general denial, sets up the fact that said M. W. Ingram, who resides in Texas, had, before the filing of the bill, obtained in the district court of Henderson county, Texas, a decree dissolving the bonds of matrimony hitherto existing between complainant and the defendant, M. W. Ingram.

The various amendments, demurrers, motion to dismiss and answers, raise the question as to the validity and effect of said decree in Texas, and as to the right of the complainant to maintain a bill for alimony after the rendition of said decree. It was claimed by the defendant that said decree was rendered after jurisdiction of complainant had been obtained by an acknowledgment of service signed by her and filed in said court. The complainant insists that said paper purporting to be her acknowledgment was a forgery, and that she never had any notice of said proceeding until long after the rendition of the decree.

A decree of divorce in one state may be impeached collaterally in the courts of another state, by proof that the court granting the divorce had no jurisdiction, notwithstanding the recitals in the decree showing jurisdiction: German Sav. Soc. v. Dormitzer, 192 U. S. 125, 24 Sup. Ct. Rep. 221, 48 L. ed. 373; Kingsbury v. Yniestra, 59 Ala. 320.

There is no pretense that any explanation was made to her as to what the paper was, even by those who claimed she signed it, her name was misspelled, and, while there is some conflict in the testimony, yet, from a careful examination of the depositions, we are satisfied that either she did not sign the service at all, or, if she did sign the paper, she was deceived so that she did not understand its purport. Consequently, the Texas court had no jurisdiction to render the decree against her, and the testimony also shows that she had a meritorious defense. The testimony also satisfies this court of the correctness of the chancellor's decision in regard to the lands mentioned in the decree, and that said lands were bought and paid for by said M. W. Ingram, and that his father and mother participated in the intent to place the

title to said [131] lands in their names for the purpose of defeating the marital rights of the complainant.

There is no allegation in any of the pleading in regard to the supposed marriage of M. W. Ingram to Selia Williams before his marriage to complainant, and, as the only witness who testified to that places the marriage twelve years before her deposition was taken in 1902, which would make it in 1890, and says that he lived with her six years and visited her twice afterward, while the incontestable fact is that he married complainant in 1895, we conclude that there must be some mistake in the identity of the person or otherwise, and the evidence is not sufficient to establish the fact of said previous marriage.

We can see no reason, from the testimony, why the children should be taken away from the mother and placed in the custody of the infirm father and mother of the man who has abandoned them and his wife.

It is the duty of the court to grant the relief prayed as to the lands.

As the view this court takes of it is that the divorce decree of the Texas court is a nullity, the chancellor, in addition to the relief which he did grant, should have also granted the prayer for a divorce a vinculo.

The decision of the chancellor being correct as far as it goes, the same is not disturbed, but, in order that the chancellor may add to the decree as it now stands a further provision granting to the complainant a divorce a vinculo matrimonii, the decree is thus far reversed and remanded.

Want of Jurisdiction May be Shown by extrinsic evidence, even against the recital of a judgment record of a sister state, that the defendant was served or appeared by attorney, or of any other jurisdictional fact: Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 102 Am. St. Rep. 519; Chicago Title etc. Co. v. Smith, 185 Mass. 363, 102 Am. St. Rep. 350.

The Effect of Decrees of Divorce rendered in another country or commonwealth is discussed in the monographic notes to Felt v. Felt, 83 Am. St. Rep. 616; Tremblay v. Aetna Life Ins. Co., 94 Am. St. Rep. 553; Montgomery v. Consolidated etc. Co., 103 Am. St. Rep. 328. Attack upon such decrees on the ground that they were rendered without jurisdiction is considered in the recent case of Forrest v. Fey, 218 Ill. 165, 109 Am. St. Rep. 249.

EQUITABLE LOAN AND SECURITY COMPANY v. EDWARDSVILLE.

[143 Ala. 182, 38 South. 1016.]

MUNICIPAL CORPORATIONS—Execution Against Property of.—Municipal corporations are created for public, governmental and political purposes, and all property of whatever nature held by them in trust for carrying out such purposes is exempt from seizure and sale under execution; but the private property of a municipality, held for purposes of income or sale, unconnected with any governmental use or function, may be levied on and sold to satisfy a judgment. (p. 36.)

MUNICIPAL CORPORATIONS.—Powers Conferred upon a municipality by an independent and original act, such as the power to buy and sell liquor, are powers conferred by its charter. (p. 36.)

POLICE POWER—Intoxicating Liquors.—The regulation of the sale of intoxicating liquor is within the police power of the state. (p. 37.)

POLICE POWER.—It belongs primarily to the legislative department, in the exercise of the police power of the state, to determine what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, subject to the power of the courts to adjudge whether any particular law is an invasion of rights secured by the constitution. (p. 37.)

MUNICIPAL CORPORATIONS—Police Powers—Dispensary.—The legislature in dealing with the sale of intoxicating liquors is fulfilling a public duty and striving to promote the health, safety and morals of the community; and, in granting to a municipality the right to establish a dispensary for dispensing intoxicating liquors, it authorizes a public use, object and purpose in the promotion of which public money may be lawfully invested and expended. (p. 37.)

MUNICIPAL CORPORATIONS—Intoxicating Liquors—Property Subject to Execution.—If the legislature has conferred upon a municipality charter power to establish and carry on a dispensary for the sale of intoxicating liquor, the municipality in conducting such dispensary exercises a governmental function and the stock of liquors in such dispensary is not subject to levy and sale under execution on a judgment against the city, even though such dispensary is run at a profit. (pp. 37, 38.)

H. D. McCarty and H. D. Merrill, for the appellant.

Blackwell & Agee, for the appellee.

183 DENSON, J. The Equitable Loan and Security Company recovered a judgment against the defendant, town of Edwardsville, a municipal corporation, in the county court of Cleburne county, on the eighteenth day of October, 1900, in the sum of eight hundred and three dollars and forty-three cents.

On the first day of April, 1902, an execution was issued on the judgment, and was, on the thirty-first day of July, 1902,

levied on a stock of spirituous and malt liquors, as the property of the town of Edwardsville.

On August 1, 1902, the defendant filed a motion to vacate the levy made under the execution, upon the ground that the property levied on was property used by the defendant in its corporate capacity for municipal [184] purposes, in that said property was used in the conduct of a dispensary under an act of the legislature, approved February 18, 1899. The act referred to is entitled, "An act to authorize municipal and other subdivisions of the state to buy and sell spirituous, vinous or malt liquors, and to further regulate or prohibit the sale of such liquors," and is found in the general acts of the legislature, session of 1898-99, at page 108.

It is alleged in the motion that the dispensary was conducted and carried on at a profit for the purpose of raising revenue, and the revenue arising from it was used exclusively for municipal purposes, and that the revenue so derived was necessary to pay the ordinary municipal expenses of the defendant.

The plaintiff moved to strike the motion to vacate the levy and also demurred to it; the motion and demurrer were overruled, and the court rendered judgment in favor of the defendant, vacating the levy.

The question now presented for our determination is whether a stock of spirituous, vinous and malt liquors, owned and used by a municipality as stock in trade in conducting and carrying on a dispensary, is property used for municipal purposes in such sense, as will, under section 2040 of the Code of 1896, exempt it from levy and sale under execution issued on a judgment obtained against the municipality.

"Municipal corporations are created for public, governmental and political purposes, and it is a corollary of this proposition that all property, of whatever nature, held by them in trust for carrying out such purposes, should be exempt from seizure and sale under execution": Tiedeman on Municipal Corporations, p. 765, sec. 375.

The doctrine as laid down by Mr. Dillon has been approved by this court in the case of Mayor etc. v. Rumsey & Co., 63 Ala. 352. Judge Stone, in the case cited, uses this language: "We do not hesitate to declare that city property, owned or used by the corporation for public purposes, such as public buildings, public markets, hospitals, cemeteries, engine-houses, fire engines and their apparatus, and other property, real or

personal, of kindred utility, cannot be taken in execution for debts of the city. But if the city owns [185] private property, not useful or used for corporate purposes, such property may be seized and sold under final process, precisely as similar property of individuals is seized and sold."

In the second edition of the American and English Encyclopedia of Law, on page 1190, the law is thus stated: "So the property of a municipal corporation which is essentially public in its nature and is held in trust for the public by the corporation, and is necessary for the exercise of its proper municipal functions, cannot be sold to satisfy the debts of the corporation. But the private property of a municipality, held for purposes of income or sale, unconnected with any governmental use or function, may be levied on and sold to satisfy a judgment rendered against the municipal corporation."

The act of the legislature above referred to, and under which the dispensary was established and conducted by the defendant in this case, has undergone judicial construction by this court, and was upheld: Sheppard v. Dowling, 127 Ala. 1, 85 Am. St. Rep. 68, 28 South. 791.

In the case cited above the court held that "A power conferred upon a corporation by an independent and original act, such as the power to buy and sell liquor conferred by this act, is a power conferred by its charter."

The dispensary act referred to above, and under which the defendant was operating the dispensary, provides: "That each incorporated town or city, in which the sale of liquor is not prohibited by law, shall have authority to conduct and carry on in its corporate name, in its corporate capacity, and through its legislative body, the business of buying and selling spirituous, vinous, and malt liquors, subject to the restrictions hereinafter mentioned." The act further provides that the municipality shall invest in said business a sum of money not less than three hundred nor more than two thousand five hundred dollars for each dispensary it may carry on.

This court held in Sheppard v. Dowling, 127 Ala. 1, 85 Am. St. Rep. 68, 28 South. 791, that it was entirely competent for the General Assembly to authorize towns and counties to carry on the liquor traffic as an incident to the regulation of that traffic provided by this act. Under the provisions of the act the [186] defendant was not compelled or required to establish a dispensary, but was given authority to do so. When, in compliance with the provisions of the act, it did es-

tablish a dispensary, it did so in its corporate name, in its corporate capacity, and through its legislative body, and in that name, that capacity and through that body only could the dispensary be legitimately conducted.

We have seen that when the municipality established a dispensary, it had the power, and it was made its duty by the law under which the dispensary was established, to provide the dispensary with a stock of liquors. A dispensary could not be conducted and carried on without the liquors, and when the liquors were purchased they could not have been held by the municipality for any other legitimate purpose than for the carrying on of a dispensary.

That the regulation of the sale of intoxicating liquors is within the police power of the state cannot be doubted, for it is established, if not literally by all the cases where the subject has been considered, certainly by an overwhelming array of authority, and the question has been put at rest by this court.

Further, "It belongs to the legislative department in the exercise of the police powers of the state, to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, subject to the power of the courts to adjudge whether any particular law is an invasion of rights secured by the constitution."

We think it is well settled that the legislature in dealing with the sale of intoxicating liquors is fulfilling a public duty; that it is striving to promote the health, safety and morals of the community; that, in the establishment of the dispensary, it constitutes a public object, use or purpose in the promotion of which public money may be lawfully invested and expended.

When the legislature determined that the traffic should be regulated by the establishment of dispensaries, and conferred on municipalities the charter power to carry on dispensaries for the sale of intoxicating liquors, and the dispensary was established by the town, [187] we think the town in carrying on the dispensary would be in the exercise of a governmental function, the primary purpose of which should be, and would be, to so regulate the sale and use of ardent spirits in the community as to promote the health, safety and morals of its people. And certainly the public would be interested in an instrumentality that in its operation would tend to the ac-

complishment of such an object: Mitchell v. State, 134 Ala. 392, 32 South. 687.

We have seen that the liquors supplied by the town to the dispensary were necessary for the carrying on of the dispensary, and that the dispensary was a public or municipal concern, a governmental function. It would seem to follow, therefore, that the stock of liquors would be held in trust by the municipality for use in which the public is concerned, its welfare promoted and the functions of government discharged.

It seems to us that, the power having been legitimately conferred upon the municipality to carry on the dispensary, and that it is an instrumentality in the operation of which the public is interested, to allow the property necessary in carrying on the dispensary to be subjected to levy and sale, might in many instances thwart the purpose of the legislature in conferring the power on municipalities to establish and carry on dispensaries, and would deprive the public of the beneficent results which were contemplated would flow from the operation of dispensaries.

It is strenuously insisted in this case by appellant that the dispensary was run for profit and a source of revenue to the town, and that therefore it is not exempt from levy and sale, and that the motion avers that the dispensary was run at a profit and that it was put in the treasury and constituted a part of the municipal revenues.

We must not forget the purpose for which the dispensary was established. The operation of a dispensary may result in profit or loss according as it is discreetly or unwisely managed. It seems that the legislature contemplated that there might be profits or losses, as the dispenser is required by the act to make reports to the legislative body of all profits and losses.

188 If in carrying on the dispensary there arose profits from the sale of the liquors, this would be a mere incident of the business engaged in, or a natural result from good business management. But it cannot be said to follow that profits would withdraw from the property its true character and convert it into property held for purposes of income or sale disconnected from any corporate use or function.

Our conclusion is, that the property levied on was used for municipal purposes, within the meaning of section 2040 of the Code, and that there is no error in the ruling of the court be-

low prejudicial to the plaintiff. The county court properly granted the motion to vacate the levy.

The judgment of the county court is affirmed.

McClellan, C. J., Haralson and Dowdell, JJ., concurring.

The Property of a Municipal Corporation which is not adapted to or used for public or governmental purposes is subject to execution: Sherman v. Williams, 84 Tex. 421, 31 Am. St. Rep. 66; State v. Buckles, 8 Ind. App. 282, 52 Am. St. Rep. 476. Compare, however, Pekin v. McMahon, 154 Ill. 141, 45 Am. St. Rep. 114; Emery County v. Burresen, 14 Utah, 328, 60 Am. St. Rep. 898.

LOYD v. OATES.

[143 Ala. 231, 38 South. 1022.]

APPELLATE PRACTICE—Trial by Court without Jury.—If a case is tried by the court without a jury, and no special finding of facts is made or requested, and the facts are not agreed upon, the conclusion of the judge stands as the verdict of a jury, and cannot be revised on appeal. (pp. 39, 40.)

DEEDS—Execution of by Illiterate Person—Signature.—If a deed, executed by a person unable to write, has the name written thereon by another, and a cross-mark is placed between the Christian and surname, but the words "his" or "her" "mark" are omitted, and the deed is then properly acknowledged, it is valid. (pp. 40, 41.)

DEEDS—Acknowledgment.—The Burden of Proof is on the attacking party to prove such a state of facts as will overcome the legal effect of the proper acknowledgment of a deed. (p. 41.)

DEEDS—Acknowledgment—Signatures.—If husband and wife appear before a proper officer and acknowledge their signatures to a deed, the conveyance is valid, although neither of them actually signed thir names. (p. 41.)

DEEDS—Description—Exceptions.—If a deed conveying a body of land in describing it contains the words "less eighty acres sold before," such exception does not affect the validity of the deed, nor is such exception void for uncertainty, as it may be made certain by parol evidence. (p. 41.)

Espy & Farmer, for the appellant.

H. A. Pearce, for the appellee.

232 DENSON, J. The record shows that this case was tried by the court without the intervention of a jury, and a judgment was rendered in favor of the plaintiff. There was no special finding of the facts by the court nor was a special finding requested nor were the facts agreed upon. On this state of the case it has been several times ruled by this court

that the conclusion of the judge stands as the verdict of a jury and cannot be revised on appeal: Code 1896, secs. 3319, 3321; Quillman v. Gurly, 85 Ala. 594, 5 South. 345; Western Union Tel. Co. v. White & Co., 129 Ala. 188, 30 South. 279; Norrille v. State, 131 Ala. 35, 31 South. 19.

After the plaintiff had offered in evidence a patent to the lands sued for, issued to Wiley Deese by the government of the United States on the twenty-fifth day of May, 1885, he then offered as evidence a deed from Wiley Deese and his wife, Caroline Josephene Deese, to plaintiff, bearing date November 8, 1894, and covering the lands sued for.

It was admitted that at the time the said deed purported to have been executed, Wiley Deese was occupying the lands as a homestead and that it did not exceed in area and value the limitations fixed by the statute relating to homestead exemptions. It was further admitted that Caroline Josephene Deese was the wife of Wiley, and was living with him at the time the deed purported to have been executed, and that she could not write her name. The deed purported to have been acknowledged in due form as required by the statute relating to acknowledgments or conveyances of the homestead: Code 1896, sec. 2034.

It was admitted that the signature of the notary public who took the acknowledgments of the deed was genuine and that he put his signature to the acknowledgments as an officer.

The plaintiff objected to the deed, on the grounds that it was illegal, irrelevant, and that the wife could not write her name, and the words "her mark" were not written against her name or over it, and because there was no [233] attesting witness to the signature, and that there was no acknowledgment by an officer authorized to take acknowledgment of the purported signature. Notaries public are authorized under Code of 1896, section 993, to take acknowledgments of conveyances.

We find upon an inspection of the deed, as set out in the bill of exceptions, that the name Caroline Josephene Deese appears to be signed to the deed, and that the cross-mark appears between the name Josephene and the name Deese, but that the words "her mark" do not appear.

Section 982 of the Code of 1896 provides that conveyances for the alienation of lands must be signed at their foot, and if the party is not able to sign his name it must be written

for him with the words "his mark" written against the same or over it, and that where the party cannot write, the signature must be attested by two witnesses. Under section 984 of the Code an acknowledgment of the deed operates a compliance with section 982 of the Code.

The onus was on the defendant to prove such state of facts as would overcome the legal effect of the acknowledgment. The bill of exceptions on this subject simply states that it was admitted Caroline Josephene Deese could not write her name; for aught that appears from the record some one wrote her name for her, and if so, it was with the acknowledgment an effectual signature.

Moreover, this court has held (and we think correctly held) that, if a husband and wife appear before an officer and acknowledge their signature to a conveyance, the conveyance is valid although neither of them actually signed their names. This ruling was based upon the theory that the acknowledgment was a sufficient recognition and adoption of the signatures as their own: McClendon v. Equitable Mtg. Co., 122 Ala. 384, 25 South. 30; Lewis v. Watson, 98 Ala. 479, 39 Am. St. Rep. 82, 13 South. 570, 22 L. R. A. 297.

At the end of the description of the lands in the deed are these words, "less eighty acres sold to W. S. Oates before." It has been argued by counsel for appellant that this clause in the deed renders it void for uncertainty. If it be conceded that the general objection to [234] the deed noted above presents this question for consideration, yet we cannot agree with counsel that the clause renders the deed void. The clause must be construed as an attempt to except eighty acres from the conveyance, and not designating any particular eighty, the question of invalidity, if applicable, is only applicable to the exception and does not affect the validity of the deed: Frank v. Meyers, 97 Ala. 437, 11 South. 832. Moreover, the exception is not void, as it might be made certain by evidence aliunde. The court did not err in overruling the objection to the deed.

In the condition the evidence was at the time the court sustained plaintiff's objection to the question asked by defendant's counsel of the witness Taylor, we cannot say there was error in the court's ruling.

No error being found in the record, the judgment is affirmed.

McClellan, C. J., Haralson and Dowdell, JJ., concurring.

A Notary's Certificate of Acknowledgment to a mortgage is a sufficient witnessing to the signature by mark to the instrument: First Nat. Bank v. Glenn, 10 Idaho, 224, 109 Am. St. Rep. 204.

The Acknowledgment of a Deed by a grantor who did not himself sign it is a sufficient recognition and adoption of the signature: Lewis v. Watson, 98 Ala. 479, 39 Am. St. Rep. 82. See, too, Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65.

WILSON v. MILLER.

[143 Ala. 264, 39 South. 178.]

INJUNCTION—Cancellation of Instruments.—The prosecution of a suit in ejectment will not be enjoined, nor the deed under which the plaintiff in ejectment claims canceled, on the ground that such deed and the record thereof have been fraudulently altered. (p. 44.)

The bill in this case was filed by the alleged owner of land, and sought to enjoin an action of ejectment pending against him, and to cancel a certain deed as a cloud upon his title, on the ground that such deed, under which the plaintiff in ejectment claimed, had been fraudulently changed by altering the date and by fraudulently interlineating so as to make it appear to antedate a deed under which the complainant claimed. The supreme court, by Haralson, J., first expressed the opinion that it was within the province of a court of equity to entertain jurisdiction to enjoin the action, and to decree the cancellation of the deed for fraud upon the facts stated, but upon a rehearing the majority of the court expressed a contrary opinion, as will appear from the opinion presented as here reported. Mr. Justice Haralson, with whom concurred Mr. Justice Somerville, in expressing his views in the original opinion, said that: "One of the well-recognized grounds of equity jurisdiction is to remove clouds from titles, when the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title. 'A court of equity will not interpose to prevent or remove a cloud which can only be shown to be prima facie a good title, by leaving the plaintiff's title entirely out of view. It is always assumed, when the court interferes, that the title of the party complaining is affected by a hostile title, apparently good, but really defective and inequitable by something not appearing on its face. Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed,

be required to offer evidence to defeat a recovery? If such proof should be necessary, the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed': Torrent Fire Engine Co. v. City of Mobile, 101 Ala. 563, 14 South. 557.

"Such a bill will not be entertained when the complainant is not in possession, unless he shows some special equity—some obstacle, or impediment, which would prevent or embarrass the assertion of his rights at law: Plant v. Barclay, 56 Ala. 561. Such bills can only be maintained, as has been held, in the absence of some special ground of equity jurisdiction, by parties who are in possession. They alone need such remedial assistance, for they cannot institute a suit at law to test the rival title: Smith's Exr. v. Cockrell, 66 Ala. 64.

"This, however, as was said by Brickell, C. J., in Lehman v. Shook, 69 Ala. 493, is 'only one of the reasons for which the court intervenes. There are other and broader reasons—the prevention of litigation, the protection of the true title and the possession, and because it is the real interest of both parties, and promotive of right and justice, that the precise state of the title be known, if all are acting bona fide; and if not, that a merely colorable and pretended claim is a fraud upon the re l owner, and as such should be extinguished: 1 Story's Equity, sec. 711a.'

"Indeed, the case referred to seems to be an adjudication of the one in hand."

Brickell, C. J., in his opinion, also among other things, said: "Whenever a deed or other instrument exists, not void upon its face, which may be vexatiously or injuriously used against a party having the rightful possession of real estate, throwing a cloud or suspicion over his title or interest, and he has not at law a plain and adequate remedy for relief against it, the constant practice of a court of equity is to intervene, and remove the cloud or suspicion, when the suspicion is reasonable, by directing that the instrument be delivered up and canceled, or by making the decree in reference to it, which, under the peculiar circumstances of the case, justice and the rights of the parties may require: Story's Equity Jurisprudence, secs. 697, 711. See, also, 3 Pomeroy's Equity Jurisprudence, sec. 1399; 16 Am. & Eng. Ency. of Law, 2d ed., p. 368. It was also held, for reasons stated in the opinion, that the pendency of the action of ejectment ought not to arrest the jurisdiction of the court."

Mr. Justice Haralson adhered to his original opinion on the rehearing, and for the reasons therein stated, dissented from the opinion finally prevailing.

W. W. Lavender and J. M. McMaster, for the appellants.

Logan & Van De Graft, for the appellee.

271 TYSON, J. On a re-examination of the question presented by this record, we have reached the conclusion that the bill is without equity.

On the facts averred, every matter invoked by complainant as a ground for equitable interference by injunction is available to him as a defense to the action of ejectment. It is true that in that action the court, in which it is pending, is impotent to cancel the deed, upon which the plaintiff relies for a recovery, as a cloud upon complainant's title. But that court has jurisdiction, and is in the legitimate exercise of it, to determine the validity of that deed and to adjudge the matter of controversy respecting the title to the land. And on the question of title the plaintiffs in that action, who are respondents to the bill, are entitled to a trial by jury and cannot be deprived of it where the defendant's defenses are cognizable in a court of law, as here, by preventing the exercise of the jurisdiction first obtained and transferring the adjudication of that question to the chancery court, as is attempted to be done. Should the complainant successfully defend the action of ejectment, he may then invoke the powers of the chancery court to cancel the deed as a cloud upon his title, or if no action had been instituted against him to test his title, he would be entitled to maintain such a bill. But after the action has been begun, his defenses being legal in contradistinction to being equitable, he will not be permitted to oust the jurisdiction of the law court or to prevent its exercise.

The case of Lehman v. Shook, 69 Ala. 486, is not an authority against this view. It is true that in that case Chief Justice Brickell expressed the opinion broadly, without regard to the question of jurisdiction on the ground of fraud, that a bill, such as this, was maintainable, but neither of the judges agreed with him. It is also true that in that case the equity of the bill was sustained. But Justice Somerville, adhering to the views expressed by him in his dissenting opinion in Smith v. Cockrell, 66 Ala. 64, concurred in the conclusion,

solely on the ground that the court had jurisdiction on account of the [272] fraud alleged. Justice Stone, in an able dissenting opinion, held that the bill was wanting in equity.

We think he was right and refer to what he there said as satisfactorily expressing our views, and we adopt his opinion as a correct exposition of the law: See, also, Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454; Womacks v. Powers, 50 Ala. 5; 3 Brickell's Digest, p. 346, sec. 223; Holt v. Pickett, 111 Ala. 362, 20 South. 432.

The decree must be reversed and the bill dismissed.

Reversed and rendered.

McClellan, C. J., Dowdell, Simpson, Anderson and Denson, JJ., concurring.

Haralson, J., adheres to his opinion.

Equity Will Grant an Injunction, in a proper case, against an action of ejectment: Jonekin v. Holland, 7 Ga. 589, 50 Am. Dec. 414; Brush v. Fowler, 36 Ill. 53, 85 Am. Dec. 382. The owner of the legal title, however, is not entitled to an injunction against an action to recover the land, because he has a perfect defense at law: Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232. Where by accident, mistake, fraud, or otherwise a party has an unfair advantage in a proceeding in a court of law, which must necessarily make the court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will restrain him from using the advantage which he has thus improperly gained: Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107.

SOUTHERN RAILWAY COMPANY v. WEBB.

[143 Ala. 304, 39 South. 262.]

CARRIERS OF LIVESTOCK—Breach of Contract.—In an action against a carrier for breach of contract to transport livestock, a count in plaintiff's complaint in statutory form is broad enough to entitle him to recover thereon, though the evidence shows that shipment was made under a bill of lading containing special stipulations. (p. 47.)

CARRIERS OF LIVESTOCK—Breach of Contract—Damages.—In an action against a carrier for breach of contract to transport livestock, which the carrier failed to deliver according to the contract, the plaintiff is entitled to recover damages for the decreased weight of the stock and their decreased market value, resulting from their detention, provided there is no stipulation in the contract for a different measure of damages. (p. 48.)

CARRIERS OF LIVESTOCK—Agent of Shipper.—If a shipper of livestock in a letter to an agent of the carrier directs as to whom

the stock are consigned, another person engaged by the shipper to deliver the stock to the carrier is not the authorized agent of the shipper to so change the contract of carriage as to direct delivery of the stock to a person other than the one originally designated by the shipper. (p. 48.)

CARRIERS OF LIVESTOCK—Duty to Deliver to Consignee Named by Shipper.—A carrier must deliver livestock shipped over his line to the consignee designated in the contract of carriage, and the delivery of such stock to another person constitutes a conversion for which the carrier is liable in any damages approximately resulting from the wrongful delivery. (p. 50.)

CARRIERS OF LIVESTOCK—Duty of Shipper—Liability for Wrongful Delivery.—The failure of a shipper of livestock to accompany and unload it on its arrival at its destination, as provided by the contract of carriage, does not relieve the carrier from liability for delivery of the livestock to another person than the one named in such contract of carriage. (p. 50.)

CARRIERS OF LIVESTOCK—Delivery to Wrong Person.—If a carrier of livestock wrongfully delivers it to a person other than the one named in the contract of carriage, thereby working a conversion, it is immaterial to the carrier's liability that he was entitled under the contract to retain the livestock carried until the freight on it was paid. (p. 50.)

CARRIERS OF LIVESTOCK—Liability for Misdelivery.—A provision in a contract for the carriage of livestock that, as a condition precedent to the right of the shipper to recover any damages for any loss or injury to such livestock, he must give notice in writing of his claim therefor, is not applicable, when the shipper seeks to recover from the carrier for delivering the livestock shipped to another person than the consignee named in such contract of carriage. (p. 51.)

CARRIERS OF LIVESTOCK—Liability for Misdelivery.—If a carrier of livestock wrongfully delivers it to a person other than the consignee named in the contract of carriage, the shipper is entitled to recover a sum which he has been required to pay the person to whom the stock was delivered for feeding it until he could regain possession thereof. (p. 51.)

CARRIERS OF LIVESTOCK—Liability for Misdelivery.—If a carrier of livestock wrongfully delivers it to a person other than the consignee named in the contract of carriage, the shipper is not entitled to recover expenses incurred by him on a trip to the place of destination of the livestock, in order to recover it, as such expense is not a proximate consequence of the carrier's breach of contract. (p. 51.)

CARRIERS OF LIVESTOCK.—If a carrier of livestock wrongfully delivers it to a person other than the consignee named in the contract of carriage, he is liable for the difference in the market value of the livestock at the place of destination, from the time of its arrival to the time that the shipper regains possession of it, although the contract of carriage stipulates that should damage occur for which the carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed a certain sum per head of the stock shipped, (pp. 51, 52.)

Humes, Sheffey & Speake, for the appellant.

V. Bouldin and L. T. Webb, for the appellee.

310 TYSON, J. This action is for the recovery of damages for the breach of a contract of affreightment for a car of hogs received by defendant at Paint Rock, in this state, to be transported by it to Atlanta, Georgia, and there delivered by it to Askew & Mixon, to whom it is alleged the hogs were consigned, as plaintiff's agents.

The special breach alleged in the second count of the complaint is, that the defendant failed to deliver the hogs to the consignees, but delivered them to another and different person, to wit, Brady Union Stock Yards. The damages sought to be recovered under this count were charges, amounting to seventy-three dollars and sixty-two cents, exacted by the 311 Brady Union Stock Yards of plaintiff before he could regain possession of his hogs, the loss in the weight of the hogs, and the decline in their market price during their detention, expenses incurred by plaintiff in making a trip to Atlanta to regain their possession, and counsel fees for bringing this action.

The trial court, it appears, allowed a recovery of all these damages, except for counsel fees and a decline in the market price of the hogs.

It is first insisted by the railway company that under the contract of affreightment, which is in writing, no recovery can or ought to be allowed, and, therefore, the affirmative charge requested by it should have been given. Preliminary to a discussion of this question, it may be well to say that the evidence tends to support each claim for damages which the plaintiff was permitted to recover, and, as we will show later on, a breach of the contract.

The case of Nashville etc. Ry. Co. v. Parker, 123 Ala. 683, 27 South. 323, is relied upon as authority in support of the contention that no recovery can be had on the first count of the complaint, which is in code form, because the evidence shows a special contract, whereas a common liability is counted on. This case was overruled on this point by Louisville etc. R. R. Co. v. Landers, 135 Ala. 504, 33 South. 482, where it was held that the code form was broad enough to cover bills of lading containing special stipulations. It can scarcely be doubted that a recovery may be had on this count for at least nominal damages, if a breach of the contract was shown, and indeed there is no good reason why the damages resulting in the decreased weight of the hogs and their market value during their detention may not be recovered under it, unless by the

terms of the contract their market price was to be determined at Paint Rock instead of Atlanta, which will be discussed when we consider the plaintiff's assignment of error.

Was there a breach of the contract shown? The bill of lading designated Askew & Mixon as the consignees; the hogs were admittedly not delivered by defendant to [312] them, but to the Brady Union Stock Yards. The way-bill showed them to be consignees, and also showed the words "Union Stock Yards" written in pencil below the names and address of the consignees, which appears to have been construed by the agents of defendant as directing their delivery of the hogs to the Union Stock Yards for the consignees. After the contract of affreightment was executed, it appears that one Robinson, who signed it for plaintiff, and to whom it was delivered for plaintiff, directed the words "Union Stock Yards" to be written on the way-bill. It is, therefore, insisted that Robinson, being the agent of the plaintiff to deliver the hogs for shipment, was authorized to change the contract of affreightment and to direct their delivery to the "Union Stock Yards." Robinson is shown affirmatively and without dispute not to have any such authority. Plaintiff had, in a letter to the agent, directed to whom they were to be assigned. The contract was written, signed and delivered, in accordance with his directions. Robinson was not his agent to make any contract for their shipment at all. His duties were simply to drive the hogs to Paint Rock and put them into the car, which he had previously ordered. It is true he signed the plaintiff's name to the contract, but this was without authority. But the plaintiff, having received the contract, must be held to have ratified his act in this respect, but not to have ratified its modification, which did not appear upon it, but only on the way-bill, which the plaintiff never saw. Nor was it otherwise shown that plaintiff knew of the change of the contract, when he received it from Robinson. At best, Robinson, under the evidence, was a special agent, and the defendant was bound at its peril to ascertain the extent of his authority: 3 Brickell's Digest, p. 22, sec. 54.

Robinson being without authority to change the contract of affreightment, as to the delivery of the hogs, a breach is shown. For undoubtedly the defendant was under as much obligation to deliver the hogs to the right person as it was to deliver them in a reasonable time [313] and at the proper place. And the delivery by it of them to the wrong person was a con-

version. The question is not one of due care, for the carrier, like any other bailee, acts at his peril in making the delivery: Angell on Carriers, sec. 324; Wood's Brown on Carriers, p. 319; 6 Cyc. 472.

"No circumstances of fraud, imposition or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightly entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter for what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed on consignment": Hutchinson on Carriers, 344.

In the case of North Pennsylvania R. R. Co. v. Commercial Bank, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287, the court, speaking to the point here under consideration, said: "The duty of a common carrier is not merely to convey safely the goods intrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of livestock with the same responsibilities which attended it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injury to each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But notwithstanding the difference in duties and responsibilities, the railroad company, [314] when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with rea-

sonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or livestock, is more strictly enforced. If the consignee is absent from the place of destination or cannot, after reasonable inquiry, be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person, to be kept on account of and at the expense of the owner. He cannot release himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them. Diligent inquiry for the consignee, at least, was a duty and no inquiry was made. Want of notice is excused when the consignee is unknown or is absent, or cannot be found after diligent search. And if, after inquiry, the consignee cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from the carrier's responsibility. He has no right under any circumstances to deliver to a stranger."

This quotation so satisfactorily announces the principle of law applicable to facts of the case, it would seem to be useless to pursue this phase of the inquiry further.

But it is said that, by the terms of the contract, it was plaintiff's duty to accompany the hogs and unload them upon their arrival at Atlanta, and had he complied with his duty in this respect, there would have been no misdelivery. This provision of the contract did not put upon plaintiff the obligation of seeing that the hogs were delivered to the consignee and not to a stranger. The obligation of defendant to deliver to Askew & Mixon was absolute, and not conditioned upon plaintiff accompanying the car.

315 It is also urged that the defendant was entitled to retain the hogs until the freight was paid upon them. This is undoubtedly true, but it did not retain them, but converted them.

A mere reading of the clause of the contract, relating to the plaintiff giving notice of his claim before bringing suit, will suffice to show that it was not intended to apply, and does not apply, to the claim for damages sought to be enforced here.

The affirmative charge requested by defendant was properly refused.

The next contention is, that the seventy-three dollars and sixty-two cents, paid by plaintiff to Brady Union Stock Yards, were not recoverable damages. There is no merit in this in-

sistence. They are claimed in the complaint and the evidence tends to show that plaintiff paid the sum, and that its payment was necessary to regain the possession of his property, which defendant had tortiously delivered to that concern. That they were proximate, and not remote, is practically admitted: Renfro's Admr. v. Hughes, 69 Ala. 581.

We are of the opinion, however, that the expenses incurred by plaintiff in his trip to Atlanta are not recoverable. They are not the proximate or natural consequence of the breach of the contract: Jackson v. Smith, 75 Ala. 97; Foster v. Napier, 74 Ala. 393. The allowance of a recovery of them by the court as damages is error for which the judgment must be reversed.

The plaintiff also prosecuted an appeal from the judgment, and insists that error was committed in not permitting him to show that, during the period of detention of the hogs at the Brady Stock Yards, their market price in Atlanta had declined from one-half to three-quarters of a cent per pound. This evidence shows that there had been no change in the market price of hogs at Paint Rock, the point of shipment, and that the hogs were shipped by plaintiff to his brokers, Askew & Mixon, for sale on the Atlanta Market. The breach of the contract by defendant, as we have shown, occurred in Atlanta, and not in Paint Rock. The contract of affreightment contained this clause: "And it is further agreed that, should damage [316] occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for hogs five dollars each."

Doubtless the ruling of the court was based upon this clause of the contract, which was construed by him to change the common-law rule fixing the measure of damages in this character of cases. Obligations of this kind are strictly construed against the carrier, and, unless the language employed is so definite and certain as to leave no room for the operation of the common-law rule, that construction will not be adopted. In other words, it must clearly appear that it was the intention of the parties that the rule of the common law was not to govern in ascertaining the damages suffered by plaintiff, but that the one fixed by the contract was to control. Whatever may be the field of operation of this clause of the contract, we are confident that it has no application to the facts of this case. It would seem that its purpose is merely to

fix the maximum value of the livestock named in it to be paid by the carrier in the event they are destroyed in transportation through its negligence. The judgment must be reversed on both appeals.

Reversed and remanded.

McClellan, C. J., Simpson and Anderson, JJ., concurring.

The Respective Duties of Carriers and Shippers of livestock are discussed in the monographic notes to Heller v. Chicago etc. Ry. Co., 63 Am. St. Rep. 548-566; Clarke v. Rochester etc. R. R. Co., 67 Am. Dec. 208-217; and in the recent cases of Nevins v. Chicago etc. Ry. Co., 124 Wis. 313, 109 Am. St. Rep. 935; Eckert v. Pennsylvania R. R. Co., 211 Pa. St. 267, 107 Am. St. Rep. 571; Atlantic etc. R. R. Co. v. Dexter, 50 Fla. 180, post, p. 116.

It is the Duty of a Carrier of Goods to Deliver them to the true owner or his assignee at its peril, and the failure to do so constitutes a conversion: Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861; Shellenberg v. Fremont etc. R. R. Co., 45 Neb. 487, 50 Am. St. Rep. 561; Marshall etc. Grain Co. v. Kansas City etc. R. R. Co., 176 Mo. 480, 98 Am. St. Rep. 508; National Newark Banking Co. v. Delaware etc. R. R. Co., 70 N. J. L. 774, 103 Am. St. Rep. 825; note to Bolling v. Kirby, 24 Am. St. Rep. 816.

MORAGNE v. DOE.

[143 Ala. 459, 39 South. 161.]

EJECTMENT—Mineral Lands.—Ejectment will lie to recover a mineral interest in lands. (p. 53.)

EJECTMENT by Administrator.—An administrator may maintain ejectment to recover possession of real estate of his intestate, without regard to whether, when recovered, it is intended for distribution or the payment of debts. (p. 54.)

LIS PENDENS—Money Judgment.—The pendency of a bill in equity filed by an heir at law for the removal of the administration of the estate into chancery for the purpose of a settlement of a special administration and distribution among the heirs, and not seeking to fix any lien, charge or encumbrance on the land, and on which an ordinary money decree is rendered, is not a lis pendens, affecting the title to land sold under execution issued on the decree rendered. (p. 54.)

LIS PENDENS—Money Judgment.—An action brought solely for the recovery of a money judgment, or for other relief, not directly affecting property, will not constitute a lis pendens, and, in the absence of fraud or collusion between the parties thereto, alienations are valid until the property is affixed with a judgment or execution lien, or taken into custody by an attachment, receivership, or other auxiliary proceeding. (p. 55.)

LIS PENDENS—Essentials.—Two things are indispensable to give the doctrine of lis pendens effect. One is, that the litigation must be about some specific thing which must necessarily be affected by the termination of the suit, and the other is, that the particular property involved must be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril. (p. 55.)

COTENANCY—Ouster.—To constitute ouster by a cotenant there must be some open, notorious assertion of an exclusive claim, and a direct interference with, or denial of, the right of another cotenant. (p. 55.)

COTENANCY—Ouster—Mesne Profits.—If one cotenant, after ousting his cotenant, rents out mineral rights owned by them, the amount agreed to be paid under the lease forms a proper basis on which to ascertain mesne profits. (p. 56.)

COTENANCY.—Tax Titles Acquired by One Cotenant inure equally to the benefit of all of the cotenants. (p. 56.)

J. Aiken, for the appellant.

Goodhue & Blackwood, for the appellee.

461 DOWDELL, J. This is a common-law action of ejectment to recover an undivided one-ninth interest in and to the iron ore contained in and upon a certain tract of land described in the complaint.

Five demises were laid in the complaint, any one of which being supported by the evidence would entitle the plaintiff to a judgment as much so as if all were made out.

The right to maintain an action of ejectment to recover a mineral interest in lands was decided by this court in the case of Alabama State Land Co. v. Thompson, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440, wherein a judgment was here rendered in favor of the plaintiff in a common-law ejectment suit for the recovery of all of the minerals in a certain tract of land.

The fifth demise laid in the complaint counts upon title in C. W. Ewing, T. G. Ewing and Annie D. Paden, as the administratrix of John S. Paden, deceased. The evidence showed that the title to the entire tract of land in controversy was originally in John S. Moragne. Upon the death of said John S. Moragne in 1881, the title vested in his eight children. In the year 1882 John B. Moragne, one of the heirs at law of the said John S. Moragne, conveyed his undivided one-eighth interest to appellant, J. M. Moragne, reserving and excepting the mineral interest. On the nineteenth day of November, 1891, John B. Moragne conveyed the mineral interest in these lands to Eula L. Moragne. On the sixteenth day of January, 1892, J. E. Hale obtained a judgment in

the city court of Gadsden against John B. Moragne. On the twenty-third day of May, 1882, William Chandler, sheriff of Etowah county, after having levied an execution thereon, and after sale under said levy, executed a deed conveying whatever interest John B. Moragne might still have in the lands to J. E. Hale. On the thirty-first day of May, 1894, J. E. Hale, [462] John B. Moragne and Eula L. Moragne united in a deed conveying the mineral interest in question to the Paden-Ewing Hardware Company. The Paden-Ewing Hardware Company was a partnership—John S. Paden, C. W. Ewing and T. G. Ewing being the members composing the same. The evidence showed that John S. Paden died in 1896, and that Annie D. Paden became, and is still, the administratrix of the estate of John S. Paden, deceased.

There can be no doubt of the right of an administrator to maintain ejectment to recover possession of real estate of his intestate, and this without regard to whether when recovered it is intended for distribution or the payment of debts: Pendley v. Madison's Admr., 83 Ala. 484, 3 South. 618; Morgan v. Casey, 73 Ala. 222; Leatherwood v. Sullivan, 81 Ala. 458; Landford v. Dunklin, 71 Ala. 594.

The case of Tarver v. Smith, 38 Ala. 135, cited by counsel for appellant, is not in point. The administratrix here is not joined with the heirs at law of the intestate, but those who are joined with her as coplaintiffs in the fifth demise laid in the complaint are cotenants of her intestate in the interest sued for.

The deed from Burns as sheriff to Dunlap, on which the defendants base a claim of title to the mineral interests sued for, is subsequent in execution to the deed of Chandler to Hale, relied on by plaintiffs—both deeds purporting to convey the interest of John B. Moragne—and is inferior as a conveyance of title to the latter deed, unless priority is given it on the doctrine of lis pendens, as contended for by appellant. The deed from Burns to Dunlap was made under a sale on execution issued on a decree for costs in a suit in equity. The theory of lis pendens is based on the pendency of a bill in chancery filed by an heir at law of John S. Moragne, for the removal of the administration of the estate which had been committed to a special administrator, into chancery, for the purpose of the settlement of said special administration and for distribution among the heirs. The bill which was filed did not seek to fix any lien, charge or encumbrance on

the land in controversy, and the decree that was rendered, and on which the execution was issued, was an ordinary money decree.

463 The doctrine is thus stated in American and English Encyclopedia of Law, second edition, volume 21, 630: "As a general rule, an action or suit brought solely for the recovery of a money judgment or for other relief not directly affecting property will not constitute lis pendens; and, in the absence of fraud or collusion between the parties thereto, alienations are valid until the property is affixed with a judgment or execution lien, or taken into custody by an attachment, receivership or other auxiliary proceeding."

In Houston v. Timmerman, 17 Or. 499, 11 Am. St. Rep. 852, 21 Pac. 1037, 4 L. R. A. 716, it is said: "Two things, however, seem indispensable to give the doctrine of lis pendens effect: 1. That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit must be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril": Citing Freeman on Judgments, secs. 196, 197. See, also, Hailey v. Ano, 136 N. Y. 569, 32 Am. St. Rep. 764, 32 N. E. 1068. We are unable to see any room for the application of the doctrine of lis pendens arising out of the chancery proceedings offered in evidence in this case.

It is shown by the evidence that in 1882 John B. Moragne, through whom plaintiffs claim title to the mineral interest in question, sold to the appellant, J. M. Moragne, his surface rights in the land and expressly reserved his right to all iron ore. Any use that applicant might have made of the surface, or any possession he might have of the land, would be referred to the estate created by his deed until he did some act which interfered with John B. Moragne's right to the iron ore. J. M. Moragne and John B. Moragne, as heirs at law of John S. Moragne, deceased, were cotenants in the iron ore; this cotenancy to the iron ore was not disturbed under the deed to J. M. Moragne from John B. Moragne, wherein the mineral interests in the land were expressly reserved to the latter, and it would require some open, notorious assertion of claim by J. M. Moragne to the iron ore, and some direct interference with or denial of John B. Moragne's right to the iron ore, to constitute an ouster of John B. Moragne so far as the iron ore was concerned. And until

this occurred, John B. Moragne would have the [464] right to suppose that appellant's holding was in accordance with the terms of the deed from him to the appellant.

The evidence failed to show that J. M. Moragne ever interfered with the iron ore until he made a lease to the North Alabama Mining Company in October, 1899. The present suit was begun in July, 1902; therefore, there could not have been three years' adverse holding, and the court, by whom the case was tried without a jury, so properly held.

On the question of mesne profits, the amount of royalty received by the appellant, J. M. Moragne, on the one-ninth interest in question, under the lease to the North Alabama Mining Company, and the balance admitted to be due by said company under said lease, was a proper measure of the recoverable damages in the action.

As to the tax title sought to be asserted by the appellant, J. M. Moragne, the case of Scott v. Brown, 106 Ala. 604, 17 South. 731, is conclusive, and against him on this proposition. Besides, if the assessment of the taxes, and the proceedings thereunder, had been in all respects regular, the tax title so acquired by one joint tenant would inure to all the tenants in common. There is no error in the record, and the judgment is affirmed.

McClellan, C. J., Tyson and Denson, JJ., concurring.

Ejectment to Recover Mines or Mineral Interests is considered in Argonaut Con. Min. Co. v. Turner, 23 Colo. 400, 58 Am. St. Rep. 245; Wilson v. Triumph Con. Min. Co., 19 Utah, 66, 75 Am. St. Rep. 718.

The Law of Lis Pendens is the subject of a monographic note to Stout v. Philippi Mfg. etc. Co., 56 Am. St. Rep. 853-878. The purpose of the rule of lis pendens is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting relief sought: Merrill v. Wright, 65 Neb. 794, 101 Am. St. Rep. 645. See, too, Summerville v. March, 142 Cal. 554, 100 Am. St. Rep. 145.

The Ouster of One Tenant in Common by his co-owner and the creation of a prescriptive title thereby are discussed in the recent monographic note to Joyce v. Dyer, 109 Am. St. Rep. 609-627.

HICKY v. STALLWORTH.

[143 Ala. 535, 39 South. 267.]

EXECUTORS AND ADMINISTRATORS—Administrators de Bonis Non.—After an estate has been adjudged finally settled, and the administrator thereof discharged by order of court, letters of administration de bonis non cannot be issued upon the same estate while such final settlement remains unrevoked and in force, the matter being res judicata. (pp. 58, 59.)

EXECUTORS AND ADMINISTRATORS—Administrators de Bonis Non.—The appointment of an administrator de bonis non, when there is no vacancy, is absolutely void, and will be so declared, even in a collateral proceeding. (p. 59.)

Ervin & McAleer and J. R. Tompkins, for the appellant.

G. L. and H. T. Smith, for the appellee.

537 SIMPSON, J. This was an action of ejectment by appellee against appellant, and the question is raised in the outset by appellant that the appointment of appellee's predecessor and himself, as administrator de bonis non of the estate of Thomas Gretopull, was void, and 538 that consequently said plaintiff (appellee) could not maintain this action.

It appears from the testimony set out in the bill of exceptions that said decedent died in 1872, and in May, 1873, his widow, Eliza Gretopull, was appointed administratrix of his estate. She married one Hickey, and in December, 1875, they filed a petition, accompanied by an account for final settlement, stating that all of the debts of the estate had been paid, and praying "that there may be a final settlement of said estate; that the accounts of said administration be audited and allowed, and that they may be relieved and discharged therefrom."

The matter proceeded regularly, and on the second Monday in December, 1875, a decree was rendered in "the matter of the final settlement of said estate," reciting the notices, etc., ascertaining the amounts of receipts and disbursements, and winding up, "It is further ordered that said Eliza and Thomas J. Hickey be, and they are hereby, discharged from further accounting in this court in the matters of said administration."

The point is made that section 111 of the Code of Alabama authorizes the appointment of an administrator de bonis non only where the preceding administrator has died, re-

signed or been removed, and that, while Eliza Hickey is now dead, yet she had previously made full settlement of the estate and been discharged.

This point does not seem to have been before this court when this case was under consideration before, nor do all of the proceedings in the probate court seem to have been before it, and the court, while stating that it is necessary that a vacancy should exist before an administrator de bonis non could be appointed, states that "The second grant can be held invalid only when there is such evidence affirmatively showing that no such vacancy existed," and goes on to state that "If she [Eliza Gretopull] continued to be administratrix, after her final settlement in 1875, and up to the time of her death her administration terminated at her death": Sands v. Hickey, 135 Ala. 322, 33 South. 827.

The entire proceedings in the probate court, which appear in the record as it is now before the court, show [539] that said administratrix did not resign nor die (while she was administratrix), nor was she removed, but she made application distinctly to wind up the estate, on the ground that it had been fully administered, and prayed to be discharged, and the court passes the account as a final settlement and decrees the discharge of the administratrix. The certificate of the probate judge shows that the exhibit contains all the proceedings in relation to said estate, and she does not appear in it again, and, in fact, after being discharged she could not act any more. So that the question is clearly presented whether or not, after an estate has been finally wound up and the administrator discharged, the probate court can open the estate again by appointing an administrator de bonis non.

The state of Indiana has a statute substantially like ours (the words in it being "die, resign or remove from the state"), and the supreme court of that state has decided that "After an estate has been adjudged finally settled, and the administrator thereof discharged, letters of administration de bonis non cannot issue upon the same estate, while such final settlement remains unrevoked and in force, the matter being res adjudicata": Pate v. Moore, 79 Ind. 20; Vestal v. Allen, 94 Ind. 268; Croxton v. Renner, 103 Ind. 223, 2 N. E. 601.

In our own state this particular point has never been decided. The probate court is a court of general jurisdic-

tion in the matter committed to it, and in the absence of proof it will be presumed that the jurisdictional facts existed, yet its jurisdiction is confined to the matters committed to it by statutes, and, if it affirmatively appear that the jurisdictional facts did not exist, its decrees will be declared void, even collaterally.

It has been decided by this court that the fact that there is a vacancy is a jurisdictional fact, and that the appointment of an administrator de bonis non, when there is no vacancy, is absolutely void, and will be so declared even in a collateral proceeding: Allen v. Kellam, 69 Ala. 442; Mathews v. Douthit, 27 Ala. 273, 62 Am. Dec. 765; Gray's Admr. v. Cruise, 36 Ala. 559; Morgan v. Casey, 73 Ala. 222.

In the later case of Henley v. Johnson, 134 Ala. 646, 92 Am. St. Rep. 48, 32 South. 1009, [540] the appointment of the administrator de bonis non is sustained, because "It is not shown by the averments of this petition, or otherwise, whether the petitioner as former administrator had been discharged by an order from his office as administrator," and if he had it might be presumed that he had resigned and then made the settlement.

In the case now before the court no such presumption can be indulged, because the entire record from the probate court is in evidence, duly certified, and shows clearly that it was simply a final winding up of the estate and a discharge of the administratrix.

We follow the Indiana cases, because they seem to be based on sound reasoning, and also consonant with the policy of our laws. It is the evident purpose of our statutes that there shall be a time beyond which the affairs of an estate must be considered settled, and the property rights of those in interest shall be at rest. Claims are to be presented within a certain time, or forever barred; parties are allowed a certain time within which to correct any errors in settlements in the probate court, after which they cannot be disturbed. While the estate is in process of administration, the heirs hold the lands of the estate subject to the right of the administrator to subject them to the payment of debts; when the estate is finally settled and the administrator discharged, the title is vested absolutely in the heir, and it is not to be presumed that it is the intention of the law (especially when not within its letter), that these titles are to be disturbed and the property made liable for costs by successive admin-

istrations, when the debts are all paid and there is no reason why it is necessary to administer.

If any peculiar case does occur not provided for by statute, resort should be had to another tribunal, where the equities of all the parties can be preserved.

It follows that the plaintiff was not entitled to recover in this case.

The judgment of the court is reversed, and a judgment will be here rendered in favor of the appellant.

Reversed and rendered.

McClellan, C. J., Tyson and Anderson, JJ., concurring.

Administrators de Bonis Non are discussed at length in the recent monographic note to Morrow v. Fidelity Deposit Co., 108 Am. St. Rep. 413-433.

WEST POINT MINING AND MANUFACTURING COMPANY v. ALLEN.

[143 Ala. 547, 39 South. 51.]

JURISDICTION of Lands in Another State.—The courts of one state have no jurisdiction to set aside a fraudulent conveyance of land situate in another, though made by a corporation in the former state. (p. 61.)

CORPORATIONS—Conveyances by—Acquiescence in Informalities by Stockholders.—Formalities required for the valid execution of a conveyance by a corporation are for the benefit of its stockholders, and if they acquiesce in a conveyance in which the necessary formalities are disregarded, other persons cannot complain thereof. (p. 62.)

Simpson & Jones, for the appellant.

E. O'Neal and T. R. Roulhac, for the appellee.

548 McCLELLAN, C. J. The bill in this cause was filed by a judgment creditor of the West Point Mining and Manufacturing Company, a corporation under the laws of Alabama, to annul a deed of trust executed by it in this state to the Florence Loan and Trust Company, also an Alabama corporation, to secure all its creditors, upon the ground that the conveyance was fraudulent as to creditors. The property conveyed by the deed of trust, consisting of real and personal property appurtenant thereto, is situated in the state of Tennessee. The deed of trust was foreclosed by the trus-

tees in this state under power of sale therein, and the property was ultimately conveyed to the United States Iron Company, a corporation under the laws of the state of New Jersey, by whom it is now held. The United States Iron Company demurred to the bill upon the ground that the property conveyed by the deed of trust is situated in the state of Tennessee. From the decree overruling the demurrer this appeal is taken.

In Bump on Fraudulent Conveyances, page 498, it is said: "The courts of one state have no jurisdiction or authority to set aside a fraudulent conveyance of land situate in another state." In the case of Lide v. [549] Parker's Exr., 60 Ala. 165, construing section 3886 of the Code of 1876, authorizing a creditor without a lien to file a bill in chancery to subject to the payment of his debt any property fraudulently conveyed by the debtor, it was held that the property referred to by the statute was property within the state of Alabama. The court said: "It cannot be presumed that the legislature meant to give to its enactment, if it could do so, an extra-territorial operation or to authorize courts of equity here, through their power over parties within their jurisdiction, to appropriate real and personal property situated in another state, for the payment of simple contract creditors in Alabama, or elsewhere." Section 3886 of the Code of 1876 was adopted into the Code of 1886, and readopted into the Code of 1896. As has been repeatedly held, this was an adoption of the previous judicial construction.

There is no distinction in principle between a bill to set aside a conveyance of property situated in another state, fraudulently transferred, filed by a judgment creditor, and one filed by a simple contract creditor. The relief is the same in both cases. To hold that a fraudulent conveyance of property situated in another state may be avoided in the courts of this state by a judgment creditor, when it cannot be done by a simple contract creditor, would effect a discrimination in favor of judgment creditors against simple contract creditors in the matter of such relief. This would be opposed to the intention of the legislature, repeatedly declared by this court, to give to simple contract creditors an equal right with judgment creditors to reach property subject to the payment of debts which has been fraudulently transferred: Lehman v. Meyer, 67 Ala. 396. "Property" was used in the same sense in both statutes.

It is averred in the bill that the execution of the deed of trust was never properly authorized by the shareholders of the West Point Mining and Manufacturing Company. The formalities averred to have been disregarded were for the benefit of the shareholders of the company, and, if they acquiesce, others cannot complain: Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375.

550 For the reasons above given, the decree of the chancellor must be reversed and a decree here rendered, sustaining the demurrer to the bill and remanding the cause.

Reversed, rendered in part, and remanded.

Tyson, Dowdell, Anderson and Denson, JJ., concurring.

Simpson, J., not sitting.

The Jurisdiction of Equity, where lands in another state are involved, is generally limited to those cases in which the relief decreed can be obtained through the party's personal obedience, and the decree in such suit imposes a mere personal obligation, enforceable by injunction, attachment or like process against the person, and cannot operate ex proprio vigore upon the lands to create, transfer or vest a title: Lindley v. O'Reilly, 50 N. J. L. 636, 7 Am. St. Rep. 802. See, however, Vaught v. Meador, 99 Va. 569, 86 Am. St. Rep. 908; Idaho Gold Min. Co. v. Winchell, 6 Idaho, 729, 96 Am. St. Rep. 290; Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782, and cases cited in the cross-reference note thereto; note to Newton v. Bronson, 67 Am. Dec. 95-106.

NEW ENGLAND MORTGAGE SECURITY COMPANY v. FRY.

[143 Ala. 637, 42 South. 57.]

DEEDS—Warranty—After-acquired Title.—If a person at the time of conveying land by deed of warranty has no title, but afterward acquires one, such title inures and passes eo instanti to his grantee, and this rule applies when the warranty is such as the law implies from the employment of statutory words. (p. 64.)

DEEDS—Warranty—After-acquired Title—Subrogation to Lienholder.—An after-acquired title vests immediately in a former grantee under a warranty deed, but such title will be held in subordination to a lien created by contract of the grantor to secure money used in acquiring such title under the statute of redemption. (p. 64.)

POSSESSION—Rents and Profits.—A prior lienholder in possession of land is accountable for rents and profits in favor of a holder of a subordinate encumbrance. (p. 65.)

MORTGAGE LIENS—Subrogation.—If a prior mortgage lien is paid with money loaned for that purpose, the mortgage given to

secure such loan may be enforced against equities which would otherwise be superior to it, but this rule of subrogation cannot be extended to a third mortgagee, with notice of such equities, who advances the money to pay off the second mortgage. (p. 65.)

LIENS—Subrogation.—Subordinate Lienholders cannot avail themselves of the right of subrogation to a prior lien discharged by them without offering to recognize the rights and equities of a prior lienholder. (p. 65.)

SETOFF may or may not be Pleaded at the election of the defendant, and unless pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense of another action by the same plaintiff is not affected or impaired by a judgment against the defendant. (pp. 66, 67.,

ADVERSE POSSESSION of Mortgagor.—Neither the possession of a mortgagor nor his grantee constitutes adverse possession to the mortgagee without an express renunciation or disclaimer of his rights brought to his knowledge. (p. 67.)

RECORD as Constructive Notice.—The record of a deed or mortgage is notice to subsequent purchasers or encumbrancers, but not to prior ones. (p. 67.)

TIME—Fractional Parts of Days.—The legal fiction that there are no divisions or fractions of a day has no application to transactions between persons, where priority of rights becomes a question of fact. (p. 68.)

TRIAL—Defenses—Burden of Proof.—If, in defense to an action, the defendant asserts paramount rights in himself in point of time, he has the burden of proof to establish them. (p. 68.)

Mallory & Mallory, for the appellant.

J. E. Webb, for the appellee.

643 McCLELLAN, C. J. The bill in this case was filed on February 14, 1898, by Mrs. Fry, for the foreclosure of a mortgage executed to the complainant on December 15, 1880, by Thomas Gill Gayle. The mortgage originally covered an undivided interest in certain lands which were subsequently partitioned. The bill prays the sale of the lands assigned in the partition proceedings to the mortgagor. It appears from the bill that the interest of the mortgagor in the land had been subsequently conveyed to the New England Mortgage Security Company, and it is properly made the sole party defendant.

The New England Mortgage Security Company filed several pleas to the bill, and also a cross-bill asserting equities claimed to be paramount to the lien of the mortgage to complainant. The defenses set up in the pleas and the equities claimed will be considered with the statement of facts pertinent to each.

It appears that before the execution of the mortgage to complainant the interest of the mortgagor in the land em-

braced therein had been sold under execution, and the deed conveying such interest had been executed to the purchaser. After the mortgage was executed the title to the property had revested in the mortgagor by the exercise of the statutory right of redemption. The mortgage contained no express covenant of warranty, but used the statutory words, "grant, bargain and sell," implying the statutory warranty that the grantor was seised of an indefeasible estate in fee simple, free from encumbrances done or suffered by the grantor. It is contended [644] by appellant that, by reason of the execution sale, the grantor had no title at the time of execution of the mortgage to complainant which he could convey, and that the title subsequently acquired by the mortgagor by the exercise of the statutory right of redemption did not inure to complainant's benefit by virtue of the warranty implied by the use of the statutory words. "The settled doctrine in this state is that if a person having at the time no title conveys land by warranty, and afterward acquires a title, such title will inure and pass eo instanti to his grantee; and that the doctrine applies when the warranty is such as the law implies from the employment of the statutory words": Swann v. Gaston, 87 Ala. 569, 6 South. 386; Higman v. Humes, 127 Ala. 404, 30 South. 733.

It appears that the money with which Thomas Gill Gayle exercised the statutory right of redemption, amounting to four hundred and forty-eight dollars and ninety-one cents, was furnished by Billups J. Gayle under the agreement or understanding with Thomas Gill Gayle that he should have a first lien or mortgage on the land for his reimbursement, and that in pursuance of said agreement a mortgage was executed by Thomas Gill Gayle to Billups J. Gayle on the 3d of October, 1882. While the title acquired by Thomas Gill Gayle by virtue of the redemption inured to the benefit of complainant by virtue of the words, "bargain, sell and convey," contained in the mortgage to her, the lien or claim then existing in favor of Billups J. Gayle, under his contract with Thomas Gill Gayle for his reimbursement of the money furnished for redemption, was not thereby displaced nor impaired: Higman v. Humes, 127 Ala. 404, 30 South. 733.

Thomas Gill Gayle, being unable to pay this mortgage executed to Billups J. Gayle, conveyed said lands to him for that purpose. Billups J. Gayle thereafter, under these facts, held the land subject to complainant's mortgage, which was un-

satisfied of record, with the right, however, to assert against complainant his paramount intervening equity existing by reason of his furnishing the money for the redemption, and the New England Mortgage Security Company claiming under him can assert the same equity: Ohmer v. Boyer, 89 [645] Ala. 273, 7 South. 663. As this equity is asserted by the New England Mortgage Security Company, as a lienholder being in possession of the property subject to the lien and to complainant's mortgage, it must as to such equity account for the rents and profits acquired by it from the land, and the same must be applied, less the necessary repairs and expenses, to the satisfaction of the lien claimed by subrogation.

The cross-complainant, the New England Mortgage Security Company, has no equity of subrogation to the lien of the Wailes mortgage: Bigelow v. Scott, 135 Ala. 236, 33 South. 546.

Assuming without deciding that the mortgage company on the facts averred in the cross-bill has, abstractly speaking, the right of subrogation to the lien of the Burns mortgage, the cross-bill is wanting in necessary averments, and offers to do equity to present that right against the complainant. The equity of subrogation attempted to be asserted was and is a mere right of action in the company, a right to have such subrogation decreed, and thereupon to have the lien of the Burns mortgage effectuated by a decree foreclosing that mortgage for its benefit. That mortgage has never been foreclosed, and claiming under it the cross-complainant stands in the shoes of the mortgagee. The foreclosure of its own mortgage did not affect Mrs. Fry's rights as mortgagor in the Burns mortgage. In that capacity she had, and still has, the equity of redemption. The cross-complainant has the equity of subrogation. Upon being subrogated, its further right is to foreclose that mortgage. Meantime the company is a mortgagee in possession. The cross-bill, while asserting the equity of subrogation, contains neither the averments nor prayer nor offer to do equity essential to a bill for foreclosure; but, to the contrary, proposes to cut off absolutely Mrs. Fry's equity of redemption. It seeks to revivify the Burns mortgage and to bind Mrs. Fry's estate by it, while denying her all rights under it. The proposition of the cross-bill is to foreclose her rights under the Burns mortgage by force of the Gayle mortgage to the company, by which she was not bound at all except through the Burns [646] mortgage, without giving

her any standing in court to effectuate her equity of redemption from the Burns' mortgage. At the most, the Gayle mortgage to the company and its foreclosure gave the company as against Mrs. Fry only the rights of Burns against her; but the cross-bill purposes to cut off her rights against Burns absolutely, because of the mere fact that the cross-complainant is entitled to have the Burns mortgage equitably assigned to it. To such end the cross-bill is without equity, and the chancellor properly sustained the d murrer which challenged its sufficiency in this aspect.

Nor could the mere fact that complainant had knowledge of and consented to the application for loan made by Billups J. Gayle to the New England Mortgage Security Company estop her from asserting the mortgage made to her. The evidence is insufficient to show that she did or said anything, or refrained from proper action or speech, to induce the action taken by the corporation, and certainly there was no duty resting on her to affirmatively object to that action: New England Mtg. etc. Co. v. Hirsch, 96 Ala. 232, 11 South. 63.

The partition of the property averred in the bill was by bill in equity, which averred that the mortgage executed to complainant was a lien upon the interest of Thomas Gill Gayle, one of the joint owners. The complainant by the averments and prayer of the bill was required to propound her claim, and have the same, if anything was due thereon, enforced against the portion of the lands which might be allotted to Thomas Gill Gayle. Complainant neglected or refused to propound her claim under the mortgage in the partition suit. She had been in possession, as administratrix, of the lands sought to be partitioned, and she was required in the partition suit to account for the rents and profits so received by her. Upon such account she was decreed to owe Thomas Gill Gayle seventy-three dollars as his share as joint owner of said rents. It is claimed that this decree, in favor of Thomas Gill Gayle against complainant, was thus a judicial ascertainment that he owed her nothing, and that she is estopped from [647] foreclosing her mortgage.

If complainant by appropriate pleading might have set off the indebtedness of Thomas Gill Gayle under the mortgage to her against his claim against her for rents received by her, and thus extinguished it, she was not required to do so. "The settled doctrine of this court now is that a setoff may or may not be pleaded at the election of the defendant, and that unless

it is pleaded, the right to sue upon it as an independent cause of action or to rely upon it in defense of another action by the same plaintiff is not affected or impaired by a judgment against the defendant": Roach v. Privett, 90 Ala. 391, 395, 24 Am. St. Rep. 319, 7 South. 808.

The New England Mortgage Security Company pleaded the adverse possession by Billups J. Gayle and itself for ten years. The evidence to sustain this plea is the execution and registration of the deed from Thomas Gill Gayle to Billups J. Gayle, January 24, 1885, and the fact that in 1890 Billups J. Gayle, in his application to the company for a loan, stated that there were no encumbrances upon the property, except the mortgage to Burns. As Thomas Gill Gayle, complainant's mortgagor, did not prima facie hold adversely to complainant, the presumption is that Billups J. Gayle, as alienee, held in the same right, and asserted no higher claim of title. "To convert such possession into an adverse holding, there must be a renunciation or disclaimer of the mortgagee's right, and that renunciation must be traced to his knowledge. Until this is done, such possession is not regarded as adverse": Smith v. Gillam, 80 Ala. 296.

It is contended that the registration of the deed to Billups J. Gayle was sufficient notice to the appellee of an adverse holding. Complainant's mortgage was recorded in 1880, and she is not charged with constructive notice of the subsequent conveyance to Billups J. Gayle. The record of a deed or mortgage is notice to subsequent purchasers of encumbrances, but not to prior ones. But if complainant was charged with knowledge of the deed to Billups J. Gayle from its registration, and the subsequent one executed to correct a mistake in the description [648] of the former, they were both quitclaim deeds, purporting to transfer only the interest of Thomas Gill Gayle in the property. Complainant would, therefore, have had the right to assume that the conveyance was in subordination to her mortgage, and not adverse. Complainant denies that she had any notice that her title as mortgagee was disputed until 1897, when the New England Mortgage Security Company offered to sell her lands to a third person; and we do not think the evidence sufficient to charge her with notice of an adverse claim for the period named.

The foregoing disposes of all the questions raised by the New England Mortgage Security Company upon the appeal

in chief, adversely to its contentions, and the decree, so far as brought into question upon its appeal, must be affirmed.

The complainant, Anna M. Fry, prosecutes a cross-appeal, the first error assigned being the subrogation of the New England Mortgage Security Company to the paramount lien held by Billups J. Gayle for money advanced by him to Thomas Gill Gayle for the redemption of the property sold under execution against him. As stated above, this was proper.

It appears from the answer of the New England Mortgage Security Company that on the fifteenth day of December, 1880, the same day the mortgage was executed by Thomas Gill Gayle to complainant, he executed a mortgage to Billups J. Gayle to secure indebtedness of nine hundred and sixteen dollars and thirty-one cents. This mortgage to Billups J. Gayle was filed for record on the same day. It is averred in the answer that, while the mortgages to complainant and Billups J. Gayle bore the same date and were filed for record on the same date, "still, as a matter of fact, the said mortgage by the said Thomas Gill Gayle to said Billups J. Gayle was prior in point of time to that executed to complainant." In the absence of any testimony upon this point, the chancellor held that it would be presumed that both mortgages were executed at the same time, and that they were therefore of equal dignity, that neither was superior to the other, and ordered a reference to [649] ascertain the amount due upon each.

When complainant proved the execution of the mortgage to her and the existence of the indebtedness thereby secured, she was entitled, in the absence of defensive facts, to a decree of foreclosure. If the respondent, the New England Mortgage Security Company, had any defense or a paramount or equal equity, the burden was upon it to allege such defense or equity and establish it by proof. There is, as has been said, no evidence to support the allegation that the mortgage to Billups J. Gayle dated December 15, 1880, was paramount to the mortgage to complainant, and there is no proof that it was equal thereto except the fact that both mortgages were executed and recorded on the same day. This fact can be held sufficient proof only upon the application of the legal fiction that there are in law no divisions or fractions of a day. This fiction does not apply to transactions between parties where priority of right becomes a question of fact: 8 Am. & Eng. Ency. of Law, 743, and authorities there cited.

The New England Mortgage Security Company having, therefore, failed to prove that the mortgage in question was executed at the same time as the mortgage to complainant, the court erred in holding it an equal lien. For this error on the appeal of complainant in the original bill, the decree will be modified as indicated, and as modified will be affirmed.

Tyson, Dowdell and Denson, JJ., concurring.

The After-acquired Title of a Grantor usually inures to his grantee: Ford v. Unity Church Society, 120 Mo. 498, 41 Am. St. Rep. 711, and note; Bernardy v. Colonial etc. Mtg. Co., 17 S. Dak. 637, 106 Am. St. Rep. 791. If, however, a conveyance with warranty is void, because the land is in the adverse possession of another, it has been held that the after-acquired title of the grantor does not inure to the benefit of the grantee: Altemus v. Nickell, 115 Ky. 506, 103 Am. St. Rep. 333.

The Right to Subrogation is the subject of an extended note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 474-533.

The Computation of Time is the subject of an extended note to State v. Michel, 78 Am. St. Rep. 372-386. Fractions of a day are not usually reckoned in the computation of time: Tilton v. Sterling Coal etc. Co., 28 Utah, 173, 107 Am. St. Rep. 689.

CASES

IN THE

SUPREME COURT

OF

FLORIDA.

L'ENGLE v. SCOTTISH UNION AND NATIONAL FIRE INSURANCE COMPANY.

[48 Fla. 82, 37 South. 462.]

INSURANCE—Recovery of Attorney Fees.—A statute authorizing the recovery of attorney fees in certain cases against insurance companies in actions upon their policies is valid and constitutional. (p. 71.)

INSURANCE—Concurrent Insurance.—If a policy of insurance on buildings contains a clause providing that it shall become void if the insured then has, or shall thereafter make or procure, any other contract of insurance, unless otherwise provided by agreement indorsed on, or added to, the policy, and it has attached to it an indorsement slip, of the same date, containing a description of the property insured, the amount of insurance written thereon, and a clause reciting that "two thousand five hundred dollars total insurance permitted," such sum being the amount of insurance written in the original policy, such indorsement slip and clause construed in connection with the whole policy permit other concurrent insurance in the sum named therein. (pp. 73, 74.)

INSURANCE—Construction of Policy.—The different provisions of a contract of insurance must be so construed, if it can be reasonably done, as to give effect to each; and where two interpretations equally fair may be given, that which gives the greater indemnity will prevail. If one interpretation, looking at the other provisions of the contract and to its general object and scope, would lead to an absurd conclusion, such interpretation must be abandoned and that adopted which will be more consistent with reason and probability, and, in all cases, the policy must be liberally construed in favor of the insured, so as not to defeat, without plain necessity, his claim to the indemnity, which, in making the insurance it was his object to secure. When the words, without violence, are susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss must in preference be adopted. (p. 74.)

CONTRACTS—Construction—Parol Evidence.—If a written contract is ambiguous or obscure, so that the contractual intention

of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject matter of the contract, of the relation of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract, may be received to enable the court to make a proper interpretation of the contract. (p. 76.)

E. P. Axtell and E. J. L'Engle, for the plaintiff in error.

A. W. Cockrell & Son, for the defendant in error.

[88] CARTER, P. J. The rulings upon the motion to strike that portion of the first count [89] relating to attorneys' fees, and upon the demurrer to the third count of the original declaration which also claimed attorneys' fees, are erroneous, for the reason that chapter 4173 of the act approved June 3, 1893, authorizes such recovery in cases of this kind. That act was not repealed by chapter 4677, approved May 31, 1899, nor is it repugnant to any provision of the constitution of this state or the constitution of the United States. This was expressly decided in Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 110 Am. St. Rep. 118, 27 South. 62, 67 L. R. A. 518. We do not mean to intimate that the judgment in favor of defendant would be reversed for these errors, if no other was found on the record.

In determining the propriety of the ruling upon the demurrer to the pleas, it will be necessary to ascertain the meaning of the clause in the first indorsement slip attached to the policy reading: "$2,500, total concurrent insurance permitted," as the policy was filed with the declaration and made a part of each count thereof. It is not claimed that any of the pleas should be construed as denying the execution of the policy, or of the indorsement slip, except the first and second, and as to these it is contended that the allegations: "Said alleged policy was void in that, without an agreement indorsed thereon or added thereto, the plaintiff had another contract of insurance on property covered by said alleged policy," should be held to constitute a denial that the clause: "$2,500, total concurrent insurance permitted," was made a part of the policy by indorsement. The court is of opinion that no such effect can be given these pleas. They do not deny the execution of the policy, nor do they deny that the indorsement slip was duly executed and attached to the policy as appears from the policy itself, made a part of the declaration. They proceed upon the theory that nothing in the policy can be construed

as a permission for other insurance, and that no agreement relating to other insurance was indorsed on the policy other than such as appears upon its face. By the terms of the policy it was to be void, unless otherwise provided by agreement, [90] indorsed thereon or added thereto, if the insured then had or should thereafter make or procure any other contract of insurance, etc. The clause quoted from the indorsement slip purports to give the insurer's consent to or permission for insurance. It has direct reference to the provision against other insurance and can have no reference to any other provision in the policy. It was inserted at the time the policy was written, for it appears upon the indorsement slip along with the description of the property insured, which bears the same date and the signature of the same agent as the policy itself. It purports clearly and definitely to give the insurer's consent or permission for "$2,500, total concurrent insurance." Unless other or additional concurrent insurance was intended, then the clause means nothing more than that the insured is permitted to take out and carry this particular policy, which is absurd, for no such permission was within the contemplation of the parties or required by the terms of the policy. The use of the word "permitted" shows that the insurer intended to give its consent to something that was prohibited by the policy. As the prohibition extends only to other insurance, and not to the insurance then written, we must apply the permission to the kind of insurance prohibited, viz., other insurance, for the conclusion is irresistible that the parties so intended it. Suppose the clause had read "concurrent insurance permitted," can it be doubted that the permission was intended to relate to other insurance and to authorize any amount, provided it was concurrent? Or suppose the clause had read "$1,500, total concurrent insurance permitted," would it be doubted for a moment that $1,500 additional concurrent insurance was intended to be permitted? The clause permits "concurrent" insurance. The word "concurrent" means "acting in conjunction, agreeing in the same act, contributing to the same event or effect, co-operating, existing or happening at the same time, operating on the same objects": Webster's International Dictionary. See, also, East Texas Fire Ins. Co. v. Blum, 76 Tex. 653, 13 S. W. [91] 572; Senor v. Western Millers' Mut. Fire Ins. Co., 181 Mo. 104, 79 S. W. 687; Washburn-Halligan Coffee Co. v. Merchants'

Mutual Fire Ins. Co., 110 Iowa, 423, 80 Am. St. Rep. 311, 81 N. W. 707, as to the meaning of the word as used in insurance contracts. It is very evident that none of these definitions give the word the precise meaning of "other," so that one can say that concurrent insurance necessarily means other insurance conclusively, but in every instance the word necessarily implies the existence of two or more things or conditions. Therefore, the term "concurrent insurance" used in granting permission for insurance cannot be construed as embracing the one amount covered by the one policy in which the permission is granted, but necessarily embraces another amount or another policy, though it might under some circumstances include the former. Otherwise we have an amount or a policy concurrent with itself alone which is an impossibility under any definition of the word. In East Texas Fire Ins. Co. v. Blum, 76 Tex. 653, 13 S. W. 572, the policy contained a provision: "Total concurrent insurance $4,000." The word "permitted" was not used, but the court held that an amount of other or additional insurance ($3,000), which with the policy so indorsed would not exceed $4,000, was thereby consented to. In Senor v. Western Millers' Mutual Fire Ins. Co., 181 Mo. 104, 79 S. W. 687, the policy covered $3,500 on buildings, boilers, engines and machinery, and $1,000 on stock. It also contained a provision as follows: "$3,500, total insurance permitted, concurrent herewith, on buildings, boiler, engines and machinery. Other insurance permitted concurrent herewith on stock." The court held that the first clause of the permit for insurance did not authorize any other insurance on buildings, boiler, engine and machinery, but the decision was largely influenced by the last clause, which using the words "other insurance," not found in the first clause, was thought by the court to constitute a controlling circumstance showing the intention not to use the term "concurrent herewith" in the first clause as authorizing additional insurance. There [92] is no such clause in the policy we are dealing with to control the interpretation of the clause we have: "$2,500, total concurrent insurance permitted." That clause, construed naturally according to the obvious meaning of the language used and the purposes for which it was inserted, carries to the mind the idea that permission is granted to do something that the policy prohibits, viz., to procure insurance, but this insurance must be concurrent with that secured by the

policy to which the permission is attached, and must not exceed $2,500; that is, the total concurrent insurance which is permitted is $2,500: See Strauss v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822; Palatine Ins. Co. v. Ewing, 92 Fed. 111, 34 C. C. A. 236. It may be admitted that the language is somewhat ambiguous, but under well-settled rules for the interpretation of contracts the conclusion we reach is correct. Thus the different provisions of the contract must be so construed, if it can reasonably be done, as to give effect to each. Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail. If one interpretation looking to the other provisions of the contract and to its general object and scope would lead to an absurd conclusion, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability. In all cases the policy must be liberally construed in favor of the insured so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss must in preference be adopted: 1 May on Insurance, secs. 174, 175, and notes; Strauss v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822; Palatine Ins. Co. v. Ewing, 92 Fed. 111, 34 C. C. A. 236. See, also, McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. Rep. 10, 46 L. ed. 64; Hagan v. Scottish Ins. Co., 186 U. S. 423, 22 Sup. Ct. Rep. 862, 46 L. ed. 1229; First Nat. Bank of Florida v. Savannah etc. Ry. Co., 36 Fla. 183, 18 South. 345. It is insisted that this interpretation loses [93] sight of the fact that by the third indorsement slip attached to the policy the insurable value of the property was fixed at $2,500, being $1,250 on each building, and that it cannot be presumed the insurer intended to permit the insured to carry other insurance equal in amount, its policy being for the full insurable value as fixed in the policy. This slip was attached in obedience to the requirements of chapter 4677, act approved May 31, 1899. This statute requires the insurer to cause the building insured to be examined by its agent and full description thereof to be made and the insurable value thereof to be fixed by him and written in the policy. It estops the insurer from denying that at the time of insuring the property was worth the amount of the

insurable value as fixed by the agent. It fixes the measure of damages in case of total loss at the amount upon which the insured paid a premium, and in case of partial loss at such part of the amount upon which premiums are paid as the damage sustained is part of the insurable value of the building as fixed by the agent. The court fails to see that the third indorsement slip has any controlling effect in the interpretation of the one relating to permission for concurrent insurance. The insurable value is required to be fixed, not for the purposes of permitting other insurance, but for the purpose of arriving at the measure of damages in case of loss. The insurer is not permitted to deny that the property was worth the amount fixed as the insurable value, but the statute does not deprive either party of the privilege of showing that it was worth more if such fact should become material. The insurable value is fixed with reference to the particular policy in which it is written, and not with reference to all other insurance that may be permitted upon the property. The matter of other insurance rests in contract. The law does not forbid it by rendering the policies void, even if the total insurance exceeds the value of the property. In such a case a moral hazard would result, and the insurer might be put to inconvenience in making settlement in case of loss if the insurance was not concurrent, but 94 in the absence of contract provisions to that effect, the policy would not be void, though the measure of damage might be different. So that the prohibition against other insurance does not come from the statute requiring the insurable value to be fixed, but results from contract provisions. These provisions render the policy void unless otherwise provided by agreement indorsed thereon or added thereto, if other insurance exists. The clause permitting "$2,500, total concurrent insurance" is an agreement indorsed on or added to the policy having direct reference to and modifying the provision against other insurance, and there is nothing in the insurable value clause which can be construed as annulling or modifying the permission given by the first indorsement slip.

In view of the interpretation placed upon the clause permitting insurance, it is evident that the pleas set up no defense to either count, for neither plea alleges that other insurance in excess of the limit permitted, viz., $2,500, existed upon the property. The fact that the company did not know

of the existence of the other insurance is not material as the permission to carry it is general, and the insured was not required by the policy to give the insurer any notice in regard thereto, further than to obtain permission to carry other insurance.

We have thus far considered the question of interpretation from a consideration of the language of the policy alone, without the aid of extraneous circumstances. The second count alleges that the plaintiff "applied to the defendant to issue a policy of insurance for $2,500, on said property, against loss or damage by fire, and directed said defendant to provide in said policy for $2,500, additional insurance upon said property. And thereafter, in compliance with said request and direction, the said defendant did issue and deliver to the plaintiff, in consideration of the sum of $56.25 to it then paid by the plaintiff, its policy of insurance, which said policy permitted $2,500 other and additional insurance." The third count contains the same allegations except [95] that it alleges that the policy issued "permitted $2,500 total concurrent insurance." The pleas do not deny that the plaintiff directed the defendant to provide in its policy for $2,500 additional insurance, and if the clause we have been considering was inserted in response to such a direction, can it be doubted that the proper construction of the clause authorizes $2,500 additional or other concurrent insurance? In 9 Cyclopedia, page 772, it is said that "if a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received to enable the court to make a proper interpretation of the instrument." This rule has been approved in this state: Solary v. Webster, 35 Fla. 363, 17 South. 646; Robinson v. Hyer, 35 Fla. 544, 17 South. 745. See, also, the authorities cited in Robinson v. Barnett, 18 Fla. 602, 43 Am. Rep. 327. The same principle has also been applied to contracts of insurance: Reed v. Merchants' Mut. Ins. Co., 95 U. S. 23, 24 L. ed. 348; Butterworth v. Western Assur. Co., 132 Mass. 489.

From the views announced it results that the judgment must be reversed and a new trial granted.

The judgment is reversed with directions to the circuit court to deny the motion to strike, overrule the demurrer to the third count of the original declaration, and to sustain plaintiff's demurrer to defendant's pleas; and for such further proceedings as may be agreeable to law and conformable to the views announced in this opinion.

Cockrell, J., being disqualified, took no part in the decision of this case.

Shackleford and Whitfield, JJ., concur.

Mr. Chief Justice Taylor and Mr. Justice Hooker Dissented upon the ground that "a practical application of the principles of construction to the case at bar, especially as they are applied in the cases cited in the majority opinion, lead to a conclusion the reverse of that of the majority opinion."

Statutes Providing for the Recovery of Attorney Fees in actions against insurance companies are constitutional: See Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 110 Am. St. Rep. 118, and cases cited in the cross-reference note thereto.

Insurance Policies are Construed liberally with a view to the protection of the insured. If a policy is susceptible of two interpretations, it will be given the one most favorable to the insured: Wertheimer-Swarts Shoe Co. v. United States Casualty Co., 172 Mo. 135, 95 Am. St. Rep. 500; Thornton v. Travelers' Ins. Co., 116 Ga. 121, 94 Am. St. Rep. 99; Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa, 555, 97 Am. St. Rep. 330; Champion Ice etc. Co. v. American etc. Bonding Co., 115 Ky. 863, 103 Am. St. Rep. 356.

The Meaning of Concurrent Insurance is discussed in Washburn-Halligan Coffee Co. v. Merchants' Mut. Fire Ins. Co., 110 Iowa, 423, 80 Am. St. Rep. 311.

CAMP PHOSPHATE COMPANY v. ANDERSON.

[48 Fla. 226, 37 South. 722.]

PARTITION—Final and Appealable Decree.—A decree in a partition suit adjudicating the rights and interests of the respective parties, ordering and appointing commissioners to make partition, according to the respective rights and interests of the parties as therein determined, is not a final, but an interlocutory, decree; but a decree in such a suit ordering a sale of the property by the commissioners, based upon their report that partition cannot be made without great prejudice to the owners of the lands, is final and appealable. (p. 82.)

PARTITION—Pleading—Place of Residence.—An allegation in a bill for partition that "according to the best knowledge and belief of your orator, the name and place of residence of" a defendant named as a corporation "is as follows, Camp Phosphate Company,

which is a Florida corporation," is a sufficient compliance with the provisions of the statute requiring the bill to state the name and place of residence of the defendant according to the best of the knowledge and belief of the complainant. (p. 83.)

EQUITY JURISDICTION—Parties.—A court of equity has power to allow necessary parties complainant or defendant to be added at any time before the final decree is entered. (p. 83.)

PARTITION—Pleading—Sufficiency.—If a bill for partition alleges that the land sought to be partitioned was conveyed by United States patent to a person named; that such person subsequently died, leaving certain named heirs at law who inherited the property; that certain of such heirs conveyed their interest by deed to complainant, and that others conveyed their interest by deed to the defendant; that complainant and defendant are in possession, claiming title by virtue of the deeds from such heirs which set forth the proportionate shares held by such parties, and other facts from which the court can see, as a matter of law, that the parties are cotenants, it is sufficient to entitle complainant to maintain his suit and is not subject to demurrer. (pp. 83, 84.)

PARTITION—Outstanding Title.—If complainant and defendant in partition claim title to undivided interests through the heirs of a former owner, defendant cannot set up an outstanding title, in a third person not in possession, derived from such former owner, and with which title he does not connect himself. (p. 85.)

PARTITION—Ouster—Adverse Possession.—Under the Florida statute courts of equity have authority to entertain bills for partition, though one of the joint owners has ousted the other, or claims under a legal title adversely, or disputes the other's right or title to the possession. (p. 89.)

PARTITION—Ejectment.—An action for partition cannot be used as a substitute for the action of ejectment, nor for the sole purpose of testing a legal title. (p. 89.)

PARTITION—Adjudication of Legal Controversies.—Under the Florida statute, whenever the case is one properly for partition between the common owners of lands, one or more of whom are complainants, and the others are defendants, all controversies between them as to the legal title and right to possession may, and should be, settled by the chancellor. (p. 89.)

CONSTITUTIONAL LAW—Jury Trial in Partition.—If a statute investing a court of equity with power to try legal titles in actions for partition without the aid of a jury is in effect at the time a constitution is adopted, the provisions in the latter in relation to jury trials does not take away the power conferred by the statute. (p. 90.)

PARTITION—PARTIES.—In a suit for partition the rights of parties cannot be adjudicated, when they are not properly before the court. (p. 91.)

PARTITION—Parties.—A decree in partition adjudicating that complainant and defendant are each owners of certain undivided interests in the land sought to be partitioned, but reserving for future adjudication the right, title and interest of the defendant to a certain other undivided interest, the legal title to which is in a third person, not a party to the suit, is erroneous, even though the decree states that it appears from the evidence that the defendant is in equity entitled to a conveyance from such third person. (p. 91.)

O. T. Green, for the appellant.

R. L. Anderson, for the appellees.

[233] Per CURIAM. The appellees have filed a motion to strike the assignments of error numbered from one to forty-eight, inclusive, and ask, in the event that said motion is denied, that this court should refuse to entertain or consider any of the said assignments. We think it advisable to consider and pass upon this motion before proceeding to dispose of the case upon the merits.

The basis of the motion is that the decree made by the chancellor on the third day of August, 1903, settling the equities between the parties, ordering a partition of the lands in question in accordance with the respective interests of the appellants and appellees, to which they were found to be entitled in the said decree, and the appointment of three commissioners therein to make the partition was the final decree rendered in the cause, from which an appeal should have been entered in order to warrant this court in considering any errors assigned thereon or prior thereto. It is further contended by the appellees that the decree rendered by the chancellor on the eighteenth day of September, 1903, based upon the report of the commissioners, to the effect that partition of the lands in question could not be made without great prejudice to the owners thereof, ordering a sale thereof by the commissioners, from which decree this appeal was taken by appellant, was not the final decree in the cause but only an interlocutory decree.

It is settled by former decisions of this court that, where several interlocutory decrees or orders are made in a case, and only certain ones specified are appealed from, only errors assigned upon the orders so specified can be considered by this court: See Mann v. Jennings, 25 Fla. 730, 6 South. 771; Lenfesty v. Coe, 36 Fla. 49, 7 [234] South. 2; Wiggins v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754. If, then, the decree appealed from is not a final decree, but is only an interlocutory decree, we are restricted to a consideration of the errors assigned thereon.

The first question to be determined, then, is as to whether or not the decree of the third day of August, 1903, is a final decree. We are of the opinion that this question must be answered in the negative. Putnam v. Lewis, 1 Fla. 455, is directly in point, expressly holding that a decree for

the partition of lands, ascertaining the interest of the respective parties, and appointing commissioners to make partition of the lands according to the respective rights and interests of the parties as therein determined, is not a final, but an interlocutory decree. We have given this question a fresh investigation and find that the principle as laid down in Putnam v. Lewis, 1 Fla. 455, is sustained by the great weight of authority: See Gudgell v. Mead, 8 Mo. 53, 40 Am. Dec. 120; McMurtry v. Glascock, 20 Mo. 432; Stephens v. Hume, 25 Mo. 349; Ivory v. Delore, 26 Mo. 505; Durham v. Darby, 34 Mo. 447; Papin v. Blumenthal, 41 Mo. 439; Hinds v. Stevens, 45 Mo. 209; Parkinson v. Caplinger, 65 Mo. 290; Murray v. Yates, 73 Mo. 13; Holladay v. Langford, 87 Mo. 577; Turpin v. Turpin, 88 Mo. 337; Bobb v. Graham, 89 Mo. 200, 1 S. W. 90; Holloway v. Holloway, 97 Mo. 628, 10 Am. St. Rep. 339, 11 S. W. 233; Buller v. Linzee, 100 Mo. 95, 13 S. W. 344; Rhorer v. Brockhage, 15 Mo. App. 16; Griffin v. Griffin, 10 Ind. 170; Cook v. Knickerbocker, 11 Ind. 230; Hunter v. Miller, 11 Ind. 356; Wood v. Wilkinson, 13 Ind. 352; Clester v. Gibson, 15 Ind. 10; Davis v. Davis, 36 Ind. 160; Kern v. Maginniss, 41 Ind. 398; Rennick v. Chandler, 59 Ind. 354; Jackson v. Myers, 120 Ind. 504, 22 N. E. 90, 23 N. E. 86; Beebe v. Griffing, 6 N. Y. (2 Seld. 465); Tilton v. Vail, 117 N. Y. 520, 23 N. E. 120; Gates v. Salmon, 28 Cal. 320; Peck v. Vandenberg, 30 Cal. 11; Peck v. Courtis, 31 [235] Cal. 207; Gilleylen v. Martin, 73 Miss. 695, 19 South. 482; Gesell's Appeal, 84 Pa. St. 238; Christy's Appeal, 110 Pa. St. 538, 5 Atl. 205; Appeal of Wistar, 115 Pa. St. 241, 8 Atl. 797; Elder v. McClaskey, 70 Fed. 529, 17 C. C. A. 251; Green v. Fisk, 103 U. S. 518, 26 L. ed. 485; Berryman v. Haden, 112 Ga. 752, 38 S. E. 53. We do not commit ourselves to all that is said in the opinion just cited, nor are we prepared to adopt or approve all of their reasoning. Our object in citing them is to show that they sustain the principle enunciated by this court in Putnam v. Lewis, 1 Fla. 455, that such a decree as that entered by the chancellor in this cause on the third day of August, 1903, is not a final decree. We are not unmindful of the fact that some authorities may be cited to the contrary: See Williams v. Wells, 62 Iowa, 740, 16 N. W. 513; Damouth v. Klock, 28 Mich. 163; McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 734; Cannon v. Hemphill, 7 Tex. 184; McFarland v. Hall's Heirs, 17 Tex. 676; White v. Mitchell, 60 Tex. 164; Talbot v. Todd,

7 J. J. Marsh. (Ky.) 456; Banton v. Campbell's Heirs, 2 Dana (Ky.), 421; Allison v. Drake, 145 Ill. 500, 32 N. E. 537; Ames v. Ames, 148 Ill. 321, 36 N. E. 110. We have given these authorities a careful examination, but after doing so are of the opinion that the conclusion upon the point in question reached by this court in Putnam v. Lewis, 1 Fla. 455, is correct, and we must follow it. Also, see 2 Ency. of Pl. & Pr. 144, and 2 Cyc. 603, where many authorities are cited.

The next question which confronts us in passing upon this motion is as to whether or not the decree of September 18, 1903, ordering a sale of the lands in question, was final or interlocutory. Upon this point the authorities are in irreconcilable conflict. A number hold that such a decree is interlocutory only, the final decree being that which confirms the sale as made by the commissioners. See to this effect a number of the Missouri cases already cited, and in addition thereto, as bearing upon this point, Cawthon v. [236] Searcy, 12 Lea (Tenn.), 649; Meek v. Mathis, 1 Heisk. 534; Abbott v. Fagg, 1 Heisk. 742; Thruston v. Belote, 12 Heisk. 249; Stevens v. McCormick, 90 Va. 735, 19 S. E. 742. On the contrary, the following authorities either expressly hold or strongly intimate that the decree ordering a sale of the lands is the final decree from which an appeal lies: Vesper v. Farnsworth, 40 Wis. 357; Fleenor v. Driskill, 97 Ind. 27; Kreitline v. Franz, 106 Ind. 359, 6 N. E. 912; Robinson's Appeal, 62 Pa. St. 213; East Coast Cedar Co. v. People's Bank of Buffalo, 111 Fed. 446, 49 C. C. A. 422; Green v. Fisk, 103 U. S. 518, 26 L. ed. 485. As was said in Robinson's Appeal, 82 Pa. St. 213, in holding such a decree to be final: "The reason is, that the decree condemns the property to conversion, and the owner's title to divestiture." And, as was said in Fleenor v. Driskill, 97 Ind. 27: "A decree in partition for the sale of the lands, after it has been ascertained that they cannot be properly divided, is as much a final disposition of the cause as the confirmation of the report of commissioners making partition of the property." We are of the opinion that this reasoning is sound and that these authorities lay down the better rule. As was said in Story's Equity Pleading, section 408: "But the decree is final, in the sense of the rule, which finally adjudicates upon all the merits of the controversy, and leaves nothing further to be done but the execution of it." This language was quoted and approved by this court in Griffin v. Orman, 9 Fla. 22, 47. Also, see Bellamy v. Bellamy, 4

Fla. 242, 254, where the following language from the opinion in Forgay v. Conrad, 6 How. 201, 12 L. ed. 404, is quoted and approved: "When the decree decides the right to the property in contest and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this [237] court, although the bill is retained for the purpose of adjusting, by further decree, the accounts between the parties." We would also refer to State v. White, 40 Fla. 297, 24 South. 160, and Whitaker v. Sparkman, 30 Fla. 347, 11 South. 542, for a discussion of what constitutes a final decree.

We are impelled to the conclusion that the decree from which the appeal was entered in the instant case was a final decree, and, therefore, the motion made by the appellees must be denied.

It may be useful to state that prior to the act of 1852, which is brought forward into the Revised Statutes of 1892, as section 1457, an appeal to this court could not be entered from an interlocutory order, but only from the final decree. See Jacksonville etc. Nav. Co. v. Broughton, 38 Fla. 139, 20 South. 829, where a history of the legislation upon this matter is given. By reason of this change in the law permitting appeals from interlocutory orders, it is not often that we would be confronted with the question which we have just been considering.

We shall not undertake to discuss every assignment of error in detail, but only such as are deemed proper in view of the further progress of the cause.

Several assignments are based on the ruling upon the demurrer to the bill. The first ground of the demurrer questions the sufficiency of the allegations as to the residence of the Camp Phosphate Company. Section 1493 of the Revised Statutes of 1892 provides that the bill in suits for partition "shall state according to the best of the knowledge and belief of the complainant the names and places of residence of the several owners, joint owners, tenants in common, or coparceners or other persons interested in said lands or real estate, ... but if the names, residence, ... of any of the owners or claimants of such lands are unknown to the complainants, then it shall be so stated in such bill, and

238 such suit may proceed in the same manner as though such unknown persons or defendants were named in the bill." Conceding, without deciding, that a failure to comply with the requirement as to stating the residence of a defendant in a bill for partition is ground for special demurrer, we think the allegation in the present bill that "according to the best knowledge and belief of your orator the names and places of residence of the several owners, joint tenants, tenants in common and others interested in said land are as follows: R. L. Anderson and H. L. Anderson, who reside at Ocala, Florida, Camp Phosphate Company, which is a Florida corporation, Charles Jones, who resides in Citrus county, Florida," is sufficient to show the name and residence of the defendant "to the best of the knowledge and belief of complainant," which is all the statute requires. In view of the language used, the words, "a Florida corporation," must be construed as stating the residence of the defendant to the best knowledge and belief of the complainant, and that a more particular description, if such is contemplated by the statute, was not within the knowledge of complainant.

The fifth ground of demurrer complains that R. L. Anderson should have been made a party complainant. At a subsequent stage of the cause before the decree of partition was entered objection was again made that R. L. Anderson was not a party, whereupon the court made him a party complainant. There can be no doubt of the power of the court to make parties at any time before a final decree is entered, and as R. L. Anderson was subsequently made a party, the error, if any, in overruling the fifth ground of the demurrer was cured in the manner stated. The defendant, under the circumstances, is not in a position to insist now that R. L. Anderson is not a proper party complainant, and as the decrees must be reversed on another ground, it does not appear to be necessary to consider whether the court erred in refusing defendant's application to remand the cause to rules, because of the presence of the new party complainant.

239 The other grounds of demurrer question the sufficiency of the allegations of the bill in respect to the title and possession of the parties. They appear to be sufficient. The bill alleges that the United States conveyed by patent to Nancy J. Hatcher; that she died leaving heirs at law who inherited the property; that some of these heirs conveyed their inter-

ests by deed to complainant, and others conveyed their interests by deeds to the defendant; that the complainant and the defendant are in possession of several portions of the land, holding such possession under and claiming title by virtue of the deeds from the heirs. These allegations show legal titles in and to undivided interests in the land in the parties complainant and defendant, derived from heirs who inherited from a common ancestor, and that the parties were in possession of several portions of the property claiming under such title. The quantity or proportionate share held by each is also stated, and from the facts alleged it appears as a matter of law that the parties are tenants in common. This is sufficient to entitle the complainant to partition: Street v. Benner, 20 Fla. 700; Keil v. West, 21 Fla. 508.

It appears from the answer of the defendant and from testimony introduced by it that prior to her death Nancy J. Hatcher executed a conveyance of the lands described in the bill to the Anglo-American Phosphate Company. Appellee, over objections of appellant, introduced testimony tending to prove that the conveyance was made upon certain conditions which were never performed; that the phosphate company after the death of Mrs. Hatcher, in pursuance of its agreement with her to reconvey upon nonperformance of such conditions, conveyed the property by deed to the administrator of Nancy J. Hatcher, and that after the partition suit was begun appellee brought proceedings against the administrator and obtained a decree requiring him to convey to appellee an undivided five-sevenths interest in the land, upon the theory that as the administrator held the bare legal title, he could be compelled to convey such legal title to grantees of [240] the heirs. Appellant insists that it was error to admit such testimony.

The bill alleges that the defendants claimed title to undivided interests in the land from certain heirs of Nancy J. Hatcher, and that complainant claimed title to undivided interests from certain other heirs of the same person. The defendant in its answer claims title from Clark and Ray, who derived their title from the state, and not from the Anglo-American Phosphate Company, and also claims to have purchased from certain heirs of Mrs. Hatcher all their right, title and interest in the property, and the proof shows that it did purchase such interests under full warranty deeds, and that it claims title, not only under the Clark and Ray pur-

chase, but under the other purchases also. The Anglo-American Phosphate Company was not, nor had it ever been, in possession of the property so far as the record shows. The defendant did not attempt to connect itself in any way with that company, and as it and the complainant both claimed title from a common source, viz., Nancy J. Hatcher, we do not think it was permissible for the defendant to set up or prove an outstanding title in the Anglo-American Phosphate Company derived from the common source. This is the rule in ejectment (Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334, 1 South. 516), and we think the same rule obtains in partition: See St. Andrews Bay Land Co. v. Campbell, 5 Fla. 560, 567. Under this view the testimony offered by both parties upon the subject should have been excluded as immaterial, though we do not say its admission would necessitate a reversal of the decrees if no other error appeared.

Other assignments of error insist that under the pleadings and evidence the court should have dismissed the bill, as it had no authority to decide the question of title, or that it should at least have required complainant to establish his title at law before decreeing partition.

It appears from the testimony that in February, 1898, Clark and Ray obtained tax deeds for the property sought
241 to be partitioned, and conveyed the same land to defendant in August, 1898; that defendant immediately began cutting timber and wood from the land in large quantities; that on October 30, 1900, it purchased from Joseph J. Hatcher, one of the heirs of Nancy J. Hatcher, all his right, title and interest in the same lands, and procured a full warranty deed purporting to convey same; that on November 1, 1900, the defendant purchased the undivided interest of Thomas S. Clark, another heir of Nancy J. Hatcher, procuring a warranty deed therefor, and that on January 17, 1901, W. N. Camp purchased at a commissioner's sale all the right, title and interest of Charles D. Hatcher, a minor, another heir of Nancy J. Hatcher, and procured a deed therefor from the commissioner. Complainant claims that the tax deeds and the deed from Thomas S. Clark were void, but we are not concerned with that question now. Prior to the fall of 1900, the defendant had cut the timber from most of the land, and for awhile men employed by it had lived in an old house situated on the land, but none of the land was inclosed or cultivated until the fall of 1900. At that time a part of

the land, less than eighty acres, was inclosed, and later on a house was built. A small part of the inclosed land was cultivated by a tenant of defendant who occupied the house. The complainant never had possession of any part of the land until the day the bill was filed, when, through an agent, he entered upon a part of the land, erected a wire fence around a few acres, and placed an agent in charge who erected a tent within the inclosure. Shortly after the bill was filed the court granted an injunction against the defendant's interference with this possession of complainant. The defendant claimed to have been in adverse possession of the property from the time it obtained the deed from Clark and Ray, and that complainant's attempt to take possession of a part of the land on the day the bill was filed should not be regarded as giving him rightful possession, nor as dispossessing the defendant. It insisted by its answer, and insists now, that being in adverse possession and claiming an [242] adverse title, the right of possession, and the validity of its alleged title cannot be tried in an action for partition, but resort must first be had to an action of ejectment, or other appropriate action at law.

In the absence of a statute authorizing it, a court of equity has no authority, generally speaking, to adjudicate the validity of an adverse legal title set up by the defendant in a suit for partition, nor to determine the right of possession where there has been an actual ouster by a cotenant, or the defendant is in adverse possession. This rule applied, not only to proceedings in equity for partition under the early English practice, but also to proceedings for partition at law. Sections 1490-1497 of the Revised Statutes of 1892 regulate proceedings for partition in this state. Such suits are required to be by bill in equity, and must be brought by one or more of several joint tenants, tenants in common, or coparceners against their cotenants, coparceners or others interested in the lands to be divided. The bill is required to describe the lands sought to be partitioned, and to state according to the best of the knowledge and belief of complainant the names and places of residence of the several owners, joint tenants, tenants in common or coparceners or other persons interested in the lands, the quantity or proportionate share held by each, and "such other matters, if any, as may be necessary to enable the court to adjudicate fully upon the rights and interests of the parties." Section

1494 provides in part that "upon application for entry of a final decree, made after a decree pro confesso, or after litigation of the cause, the court shall proceed to ascertain and adjudicate the rights and interests of the parties, either by reference to a master, by a hearing upon the pleadings and proofs, or in such other way or manner as may be most convenient and according to the ordinary rules and practice of the court; and shall also decree that partition be made if it shall appear that the parties are entitled to the same." In Street v. Benner, 20 Fla. 700, the circuit court dismissed the bill for partition because the plea and answer tendered [243] issues respecting the legal title. This court, construing the statute from which the sections of the Revised Statutes referred to were complied, in reversing the decree dismissing the bill said: "Construing this statute according to the ordinary rules of construction, the direction to the court to 'ascertain and adjudicate the rights and interests of the parties' involved in the issues made by the pleadings upon the evidence to be taken and submitted according to the usual methods of procedure in chancery is nothing less than a direction to decide and decree what these respective rights are as they may appear from the law and the testimony. There is nothing in the act requiring the court of chancery to ascertain what the verdict of a jury might be upon the facts, but the court must ascertain and decide the rights and interests of the parties upon the evidence before it. The plain meaning of the statute seems to be that all proper issues made in a suit for the partition of lands shall be tried and determined by the court in which the proceeding is commenced, and according to its rules, and whatever investigation is necessary to enable the court to adjudicate the rights and interests of the parties may be conducted by it. Having the power the court should exercise it." In Keil v. West, 21 Fla. 508, the court says: "It was never sufficient in a case of this kind for the defendant to merely deny complainant's title. He had to answer the bill, and if he proposed to set up a title adverse to complainant, or to dispute complainant's title, he had to discover his own title or show wherein the complainant's title was deficient. The titles being spread upon the pleadings, if the court could see that there was no valid legal objection to complainant's title there was then no reason why the court should not proceed to order partition. When the statement of the title showed a disputed or doubtful legal title, the court could

dismiss the bill and send the complainant to law, or maintain the bill till a court of law had settled the title. Where the title was equitable the court of equity could always settle it." The court there referred to and quoted from Street v. Benner, 20 Fla. 700, certain language [244] construing the statute. It also said: "We do not say that a bill which shows, in compliance with the rule in such cases that a defendant is in possession of the premises, claiming them adversely to complainants would not oust the equitable jurisdiction; no such case is before us, and in its absence we say nothing." In Rivas v. Summers, 33 Fla. 539, 15 South. 319, the two previous cases are referred to and it is there said that the meaning of the former decision (Street v. Benner, 20 Fla. 700) is that whenever the case is properly one of partition, one whose bona fide object is the partition of lands among common owners thereof, then all controversies as to the legal title may be settled by the chancellor under our statute; but that it was not intended by the statute that a proceeding under it should be used as a substitute for or equivalent of an action of ejectment, or for the sole purpose of testing a legal title or trying an issue as to it. It is admitted in Rivas v. Summers, 33 Fla. 539, 15 South. 319, that Street v. Benner, 20 Fla. 700, was not overruled by Keil v. West, 21 Fla. 508, and while the discussion in Rivas v. Summers, 33 Fla. 539, 15 South. 319, shows some doubt in the minds of the court lest the construction given the statute in Street v. Benner, 20 Fla. 700, might be taken too broadly, still the former construction is not repudiated. Before the statute was passed equity had authority to entertain suits for partition, and it always had jurisdiction to adjudicate an equitable title in such proceeding. And in such suits a bare denial of complainant's legal title was not sufficient to send the complainant to law to establish it, but it was necessary for defendant to set out in his answer his own if he claimed adverse to complainant, or to show wherein complainant's title was defective if he denied such title, and if upon the showing made there appeared no valid legal objection to complainant's title, the court of equity could proceed with the partition. It was only when the statement showed a disputed or doubtful legal title that the complainant would be remitted to his action at law. The defect in the law as it then stood was, that in all cases where one joint owner had ousted another, or claimed adversely under a doubtful legal title, or disputed the other's [245] title, such other must maintain two

actions, one at law to establish his title or right of possession, the other in equity for partition before he could secure partition of the joint property. If the court of equity could be given authority to determine questions respecting the legal title in the partition suit, extra expense, as well as the delay incident to the prosecution of two successive actions, would be avoided, and one court could in the same suit do complete justice. The statute already referred to devests the law courts of power to partition property, vests the power exclusively in courts of equity, and directs them to ascertain and adjudicate the rights and interests of the parties and to decree that partition be made if it appears that the parties are entitled to the same. Instead of directing the equity court to remit the complainant to an action at law, as was the practice before the act was passed, it directs such court to proceed to ascertain and adjudicate the rights and interests of the parties. The language used will bear no other reasonable interpretation, and we cannot doubt that the object was to remedy the defect in the law already pointed out. While this is true, it is equally true that the action of partition cannot, under this statute, be used as a substitute for the action of ejectment, nor for the sole purpose of testing a legal title. But whenever the case is properly one of partition, one whose bona fide object is the partition of lands between common owners thereof, one or more of whom are complainants and the others are defendants, then all controversies between them as to the legal title may and should be settled by the chancellor under our statute. This is the construction which other courts give to somewhat similar statutes enlarging the equitable jurisdiction in partition, and we are satisfied that this construction which the court in Street v. Benner, 20 Fla. 700, placed upon the statute is correct and should be adhered to: Pillow v. Southwest Virginia Imp. Co., 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32; Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216; Davis v. Settle, 43 W. Va. 17, 26 S. E. [246] 557. See, also, Weston v. Stoddard, 137 N. Y. 119, 33 Am. St. Rep. 697, 33 N. E. 62, 20 L. R. A. 624.

The answer of the defendants insists that it is entitled to a jury trial upon the question of legal title, but the construction we give the statute denies that right. Is the statute unconstitutional for that reason? The argument for an affirmative answer is that as the statute places within the jurisdiction of courts of equity which proceed without juries cases

that, without the statute, could only be tried at law, where a jury trial is a matter of right, it infringes that provision of the constitution securing the right to a jury trial. The statute was enacted in 1844, before the constitution of 1845 became effective, and was re-enacted by the adoption of the Revised Statutes of 1892. The constitution of 1845, as well as the subsequent constitutions of 1865, 1868 and 1885, contain provisions guaranteeing the right of jury trial, but they have all been construed as securing the right in those cases only in which it was enjoyed when the constitution became effective, and not as conferring upon every party in all classes of cases a right of trial by jury: Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 114, 48 Am. Dec. 178; Blanchard v. Raines' Ex., 20 Fla. 467; Hunt v. City of Jacksonville, 34 Fla. 504, 43 Am. St. Rep. 214, 16 South. 398. As the act of 1844 had invested the court of equity with power to try legal titles in partition at the time the first constitution—that of 1845—became effective, the provisions relating to jury trial in our constitutions cannot be construed so as to take away that power, and consequently the statute is valid: Pillow v. Southwest Virginia Improvement Co., 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216.

It appears from the pleadings and the testimony that complainant claimed title to undivided interests in the land sought to be partitioned from certain heirs of Nancy J. Hatcher, and that defendant, who was in possession, also claimed title to undivided interests from certain other heirs of the same deceased party. This makes them tenants in common within the meaning of the statute, even though the [247] defendant was in exclusive adverse possession and claimed legal title to the whole premises from another source, and under the terms of the statute the court of equity is authorized to adjudicate the rights and interests of the parties, and to this end it may, and should, determine the validity of the defendant's adverse title as well as the complainant's right to possession.

The decree of partition finds that W. N. Camp holds the legal title to, while the defendant is the equitable owner of, an undivided one-seventh interest in the land sought to be partitioned, and although W. N. Camp is not a party to the suit, it proceeds to decree partition between the complainant and the defendant, reserving for future adjudication the question of ownership of the one-seventh interest above mentioned.

An assignment of error is based upon this feature of the decree. If W. N. Camp holds the legal title to an undivided one-seventh interest in the property, he is a tenant in common with the complainant and the defendant, who are decreed to be the owners of the legal title to separate undivided interests in the same property, and is, therefore, a necessary and indispensable party to the suit. The statute requires the suit to be brought by "one or more of several joint tenants, tenants in common or coparceners, against their cotenants, coparceners or others interested in the lands to be divided." It requires all of such cotenants or coparceners to be made parties to the suit if known. In such suits the rights and interests of necessary and indispensable parties cannot be adjudicated when they are not properly before the court: Nelson v. Haisley, 39 Fla. 145, 22 South. 265. It was error, therefore, for the court to decree partition, or to determine that the defendant was the equitable owner of the interest to which W. N. Camp held the legal title, as W. N. Camp was not a party to the suit, and could not be bound by the decree. Nor was that portion of the decree authorized by the latter part of section 1494 of the Revised Statutes, which provides that: "When the rights and interests or proportions of the complainants are clearly established to the satisfaction [248] of the court, or are undisputed, the court may by decree order partition to be made, and the shares, proportions or interests of the complainant or complainants, and such of the defendants as have established and satisfactorily proved their respective shares, interests or proportions to be set off and allotted to them, leaving for future adjustment (by further proceedings in the same cause) the rights, shares and interests of the other defendants," for that provision contemplates that the rights, shares or interests to be reserved for future adjustment must be of some person who, if known, must be a party defendant to the suit. It cannot be construed as authorizing the court to decree partition, and if that cannot be had, a sale of the property, where only a part of the several known joint tenants, tenants in common or coparceners are parties to the suit, nor as authorizing it to decree that the equitable title to a portion of the property is in a defendant, where the legal title stands in the name of a known person not a party to the suit. For this error in the decree it must be reversed.

Other interesting questions are presented, but as we reverse the decree because of a defect in respect to parties, we do not deem it advisable or necessary to discuss them at this time.

The decrees directing partition, confirming the report of the commissioners, and directing sale of the property are reversed and the cause is remanded for such further proceedings as may be necessary and proper, consistent with this opinion. Appellees will be required to pay the cost of this appeal.

Carter, P. J., and Shackleford and Whitfield, JJ., concur.

Taylor, C. J., and Hocker and Cockrell, JJ., concur in the opinion.

In the Case of Girtman v. Starbuck, 48 Fla. 265, 37 South. 731, the supreme court decided, on the authority of the principal case, that under sections 1490-1497 of the Revised Statutes of Florida of 1892, a court of equity has jurisdiction to entertain a bill for partition filed by one who claims an undivided interest in the land sought to be partitioned under a conveyance from the defendants, even though the latter are in exclusive possession of the land, claiming that the deed to complainant is merely a contract to convey, and not a conveyance, and that the court also has authority to adjudicate the rights and interests of the respective parties therein, even though the complainant has never had possession of any part of the land. The court also decided on the authority of Cheney v. Ricks, 168 Ill. 533, 48 N. E. 75, that under the Florida statute, Revised Statutes of Florida of 1892, section 1497, providing that every party in interest, whether complainant or respondent, shall by decree of the court be bound to pay a share of the costs and charges, including attorney fees of complainants' solicitor arising from the suit for partition or sale of the land in proportion to his interest, attorney fees cannot be allowed to a complainant, who, as an attorney at law, conducts the proceedings in person, and is not represented by an attorney.

In a Partition Suit the Order of Sale is not a final judgment, according to Halloway v. Halloway, 97 Mo. 628, 10 Am. St. Rep. 339, from which an appeal will lie. And in Cudgell v. Mead, 8 Mo. 53, 40 Am. Dec. 120, it is decided that an interlocutory decree that partition be made of personalty cannot be appealed from. But in Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190, it is held that an interlocutory decree or order directing the construction of weirs at a large expense for the partition of water, and also directing that valuable improvements be made to facilitate partition in kind, involves the merits of a contest for the partition of a water power, and may be appealed from, although no final decision has been rendered.

PORTER v. VINZANT.

[49 Fla. 213, 38 South. 607.]

MUNICIPAL CORPORATIONS—Ordinances—General Powers. The difficulty of making specific enumeration of all such powers as the legislature may intend to delegate to municipal corporations renders it necessary to confer some power in general terms. (p. 94.)

MUNICIPAL CORPORATIONS—General Powers.—The general powers usually given to municipal corporations are designed to confer other powers than those specifically enumerated. (p. 94.)

MUNICIPAL CORPORATIONS Have Only Such Powers as are conferred upon them by express legislation or by necessary implication from those expressly given. (p. 94.)

MUNICIPAL CORPORATIONS.—General Powers conferred upon municipal corporations are to be construed with reference to the purposes of the incorporation. (p. 94.)

MUNICIPAL CORPORATIONS—Ordinances—Cruelty to Animals.—Authority to pass ordinances against cruelty to animals is among the powers which may properly be conferred upon municipal corporations, and such authority may be included in powers given in general terms, where there is nothing in the enumeration of the particular powers conferred to limit the operation of the general welfare clause in their charters. (pp. 94, 95.)

G. W. Walker, for the plaintiff in error.

W. H. Ellis, attorney general, for the defendant in error.

214 WHITFIELD, C. J. The plaintiff in error presented to the circuit judge for Duval county a petition for a writ of habeas corpus, alleging that he is detained in the custody 215 of W. D. Vinzant, as chief of police of the city of Jacksonville, Florida, under process issued pursuant to a judgment and sentence of the municipal court of said city, wherein and whereby he was found guilty of a charge of cruelty to animals in violation of an ordinance of said city, and alleging that said judgment and process under which he is held by said chief of police are void, because the charter of said city does not authorize the passage of such ordinance. The circuit judge denied the application for a writ of habeas corpus. A writ of error was granted by a justice of this court.

The plaintiff in error contends that he is illegally deprived of his liberty, because the sentence of the municipal court under which he is held is void, as the charter of the city of Jacksonville does not authorize the passage of the ordinance under which he was convicted and sentenced upon the charge of cruelty to animals.

Chapter 3775 of the acts of 1887 is: "An act to establish the municipality of Jacksonville, provide for its government and prescribe its jurisdiction and powers." In section 4 of the act it is provided that "the mayor and city council shall within the limitations of this act have power by ordinances to make regulations to secure the general health of the inhabitants and to prevent and remove nuisances; to provide for the arrest, imprisonment and punishment of all disorderly persons within the city, by day or by night, and for punishment of all breaches of the peace, noise, disturbance and disorderly assemblies; to pass all ordinances necessary for the health, convenience and safety of the citizens, and to carry out the full intent and meaning of this act, and to accomplish the object of this incorporation." A large [216] number of particular subjects are mentioned in section 4 upon which ordinances may be passed, but cruelty to animals is not one of them.

Counsel for the plaintiff in error argues that the enumeration of the particular subjects upon which ordinances may be passed excludes others not embraced in the enumeration; and that the general provisions quoted above do not authorize the passage of an ordinance against cruelty to animals, because legislative powers delegated to municipal corporations should be strictly construed.

The difficulty of making specific enumeration of all such powers as the legislature may intend to delegate to municipal corporations renders it necessary to confer some power in general terms. The general powers usually given to municipal corporations are designed to confer other powers than those specifically enumerated. Municipal corporations have only such powers as are conferred upon them by express legislation or by necessary implication from those expressly given, and general powers conferred are to be construed with reference to the purposes of the incorporation. Authority to pass ordinances against cruelty to animals is among the powers which may properly be conferred upon municipal corporations, and such authority may be included in powers given in general terms, where there is nothing in the enumeration of the particular powers conferred to limit the operation of the general welfare clause: Mernaugh v. City of Orlando, 41 Fla. 433, 27 South. 34.

The general powers contained in the charter act, as above mentioned, fairly include the power to pass an ordinance

against cruelty to animals: City of St. Louis v. [217] Schoenbusch, 95 Mo. 618, 8 S. W. 791; State v. Karstendiek, 49 La. Ann. 1621, 22 South. 845, 39 L. R. A. 520.

The order denying the writ of habeas corpus is affirmed.

Shackleford and Carter, JJ., concur.

Taylor, P. J., and Hocker and Cockrell, JJ., concur in the opinion.

The Constitutionality of Statutes declaring cruelty to animals to be a crime is discussed in State v. Neal, 120 N. C. 613, 58 Am. St. Rep. 810; Bland v. People, 32 Colo. 319, 105 Am. St. Rep. 80. In this last case it is held that a statute forbidding the docking of horses' tails and prohibiting the use of unregistered docked horses is a valid exercise of the police power.

FLORIDA PACKING AND ICE COMPANY v. CARNEY.

[49 Fla. 293, 38 South. 602.]

INJUNCTION Against Execution Sale of Personalty.—A court of equity will not enjoin a levy upon and sale of personal property unless it is of such peculiar value and intrinsic worth to its owner that its loss cannot be compensated adequately in damages. (p. 96.)

EQUITABLE JURISDICTION—Dismissal of Bill.—If it is apparent to the appellate court upon the face of a bill in equity that it does not state a case cognizable in a court of equity, the court will dismiss such bill for want of equity, even though the question of equitable jurisdiction is not presented by the pleadings or raised before the appellate court. (p. 97.)

R. L. Anderson, for the appellant.

W. H. Ellis, attorney general, for the appellee.

[294] TAYLOR, J. The appellant filed its bill in equity in the circuit court of Marion county against the appellee as tax collector of said county, alleging in substance that said defendant, as such tax collector, had levied upon certain enumerated personal property of the complainant, to enforce the collection of the license tax imposed upon wholesale dealers in fresh meats by section 16 of chapter 5106 of the laws of Florida. The bill alleges that the complainant never did at any time deal at wholesale in fresh meats, but deals exclusively in meat that had been cured by being salted, pickled,

smoked, etc., and that the complainant is not, therefore, subject to the tax for the collection of which said levy was made. The bill prays that the provisions of the law aforesaid may be adjudged to be inapplicable to the business engaged in by complainant, and that it cannot be lawfully required to pay the license tax thereby imposed. The bill also prays that the defendant be enjoined from ever seizing upon, holding, advertising or selling any of its property, or from attempting so to do, in satisfaction of said tax, and from collecting or attempting to collect such tax.

The defendant demurred to said bill substantially upon the following grounds: 1. That said bill is without equity; 2. That said complainant has not by said bill shown itself to be entitled to the relief there prayed; 3. Because it appears from the facts set forth in said bill that the complainant is liable for the tax, the collection of which is sought by the bill to be enjoined; 4. Because it appears that the complainants were, and are, wholesale dealers in fresh meats, packed or refrigerated within the meaning of section 16, chapter 5106 of the laws of Florida, and is liable to the tax imposed by said section; 5. Because [295] the bill states a conclusion of law inconsistent with the facts given.

The court below, in its ruling upon the demurrer, ignored those grounds thereof that questioned the equity of the bill, and sustained said demurrer upon the ground that under the allegations of the bill the complainant was a wholesale dealer in fresh meats, and therefore was subject to the license tax imposed by the section of the statute mentioned. The court, by a subsequent order, dismissed the bill.

The decision of the court below was substantially upon the merits of the controversy, when in fact it should have abstained from any consideration of the merits, and should have sustained the demurrer and dismissed the bill upon the first ground thereof alone, viz., that there was no equity in the bill, without passing upon the merits of the case. This court in divers cases has settled the rule beyond further controversy, that a court of equity will never interfere to restrain by injunction a levy upon and sale of personal property, unless the same is of such peculiar and intrinsic value to the owner that its loss cannot be compensated adequately in damages, and that the remedy in such cases is at law by an action of trespass, or other appropriate remedy in the courts of law. And it has further been settled by repeated decisions here

that where it is apparent to the appellate court upon the face of a bill that it does not state a case cognizable in a court of equity, it will dismiss such bill for want of equity, even though the question of equitable jurisdiction was not presented by the pleading or raised before the appellate court: City of Jacksonville v. Massey Business College, 47 Fla. 339, 36 South. 432, and cases therein cited.

296 Upon the merits of the case, growing out of the facts stated, it would be improper for us, as it was improper in the court below, to express any opinion whatsoever at this time. The court below ruled correctly in sustaining the demurrer to the bill and in dismissing such bill, but sustained it upon the wrong ground—it should have been sustained solely upon the ground of a want of equity in said bill. The decree of the court below is, therefore, hereby affirmed, but not for the reasons or upon the grounds upon which such decree was made by the court below, and without prejudice to the right of the appellant to relitigate the questions presented by his bill in an appropriate action at law, as he may be advised. The costs of this appeal to be paid by the appellant.

Hocker and Cockrell, JJ., concur.

Whitfield, C. J., and Carter and Shackleford, JJ., concur in the opinion.

INJUNCTION AGAINST EXECUTION SALES OF PERSONAL PROPERTY.

I. Generally, 97.
II. Property in Custodia Legis, 99.
III. Sale of Mortgaged Chattels, 99.
IV. Property of Third Persons, 99.
V. Purchaser from Execution Debtor, 99.
VI. Sale Under Subsequent Execution, 100.
VII. Prior Encumbrance, 100.
VIII. Partnership Property, 100.
IX. Exempt Property, 101.

I. Generally.

It is an almost universal rule that a sale under execution of personal property will not be enjoined unless it possesses some peculiar value or attribute to the owner, or the sale would cause him irreparable damage, or unless for some other reason he has no full and adequate remedy at law. In other words, where the remedy at law

is adequate, equity will not interfere to enjoin the sale of personal property: Jacks v. Bigham, 36 Ark. 481; Boone v. Van Gorder, 164 Ind. 499, 108 Am. St. Rep. 312, 74 N. E. 4; Beatty v. Smith, 2 Smedes & M. 567; Randolph v. Randolph, 6 Rand. 194; Chaffee v. Coggshall, Fed. Cas. No. 2571a. Under this rule it has been decided that where the plaintiffs in a bill in chancery sought to restrain the defendants from selling under execution specific articles of property on the ground that they consisted of family relics, family pictures and gifts from deceased friends of great interest and value to the plaintiffs, and it was found that the only articles within that description which had been levied upon were four ottomans, four vases, a solar lamp and a china tea set, which articles had been given in the lifetime of the testator to his wife (now his widow), by friends and relatives, as family presents, that she was not a party to the suit, and that the plaintiffs did not offer to pay the value of the articles which they sought to protect, a court of equity ought not to interfere to prevent the sale: Johnson v. Connecticut Bank, 21 Conn. 148. It has also been determined that an administrator cannot enjoin the sale, under execution, of a valuable painting belonging to his intestate's estate, upon the ground that there is no local market for it, and that, to prevent a sacrifice, it should be sold in a foreign market: Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763.

Slaves in the southern states were almost universally held to be property of such peculiar value to their owners, that they could not, in any event, be fully compensated in damages, in any proceeding at law, in case such slaves were sold under execution. Hence their sale under execution on a wrongful levy was enjoined in equity: Sanders v. Sanders, 20 Ark. 610; Beatty v. Smith, 2 Smedes & M. 567; Henderson v. Vault, 10 Yerg. 30; Sims v. Harrison, 4 Leigh. 346; Randolph v. Randolph, 6 Rand. 194; Janell's Admr. v. Eddins, 2 Patt. & H. (Va.) 579. But in Du Pre v. Williams, 5 Jones Eq. 96, it was held that a slave possessed no peculiar value, so that a sale of it under execution would cause irreparable damage, and that if a wrongful sale of it were thus made, adequate reparation could be obtained at law. Upon a showing that a threatened execution sale, if allowed to proceed, would prove ruinous to the complainant, and that it was then unnecessary to preserve the security of the judgment creditor, an injunction will issue to delay any further proceedings at law at that time: Ex parte Grimball, T. U. P. Charlt. (Ga.) 153. And in some cases an injunction will lie to restrain proceedings under an execution improvidently issued, or wrongfully levied, when that affords a remedy more complete and speedy than that afforded by an action at law: Grant v. Cole, 23 Wash. 542, 63 Pac. 263.

Where an execution has been issued on a judgment which is right as to a part of its amount, the execution defendant cannot

enjoin the collection of the execution until he has first paid or tendered the part which is right: Russell v. Cleary, 105 Ind. 502, 5 N. E. 414.

II. Property in Custodia Legis.

A temporary injunction may be granted to restrain the sale of personal property under execution, when it appears that such property is in custodia legis, and is not subject to the satisfaction of the judgment under which the execution issued, and that a sale would confer no title on the purchaser: Ryan v. Parris, 48 Kan. 765, 30 Pac. 172.

III. Sale of Mortgaged Chattels.

A mortgagee of cattle is not entitled to an injunction to restrain their sale under execution levied by a creditor of the mortgagor, as the statutory proceeding of trial of the right to property affords an adequate remedy at law: Williams v. Farmers' Nat. Bank, 22 Tex. Civ. App. 581, 56 S. W. 261.

IV. Property of Third Persons.

A court of equity ought not to grant an injunction to stay the sale of personal property, levied on by a sheriff by virtue of an execution, which property is owned by a third person, when the property is not, from its nature, of peculiar value to the owner, and when its sale will not obviously greatly injure him by the consequential damages it will produce: Allen v. Winstandly, 135 Ind. 105, 34 N. E. 699; Allen v. Freeland, 3 Rand. 170 (overruling Wilson v. Butler, 3 Munf. 559); Baker v. Rinehard, 11 W. Va. 238; Rollins v. Hese, 27 W. Va. 570. But if it appears that property which belongs, bona fide, to complainant is about to be sold under execution as the property of a third person, and where the bill alleges that this property constitutes his stock in trade and merchandise, that the consequences of permitting it to be seized and sold would utterly destroy his trade, credit and business as a merchant, and deprive him of his means of support, an injunction will issue, as this case presents elements of apprehended damages and injury which could not be redressed in a court of law: McCreedy v. Sutherland, 23 Md. 471, 87 Am. Dec. 578; Walker v. Hunt, 2 W. Va. 491, 98 Am. Dec. 779.

V. Purchaser from Execution Debtor.

A bill for an injunction to restrain proceedings upon an execution upon personal property claimed by the complainant under title from the person against whom the execution issued, not showing that the property was of such a character, or possessed of such peculiar value or interest to the owner that he could not be adequately compensated by damages at law, is not sufficient to warrant the granting of an injunction: Lewis v. Levy, 16 Md. 85; Freeland v. Reynolds, 16 Md. 416. In such case an injunction restraining the sale will not lie, unless the injury would be irreparable, and this must

appear by a clear showing of the complainant's right to the property and the defendant's insolvency: More v. Ord, 15 Cal. 204. Upon a showing that an injunction is the only speedy, adequate and unembarrassed remedy open to such purchaser for the vindication of his rights, the injunction restraining the sale of the personalty purchased will issue: Ford v. Rigby, 10 Cal. 449.

A court of equity, it seems, has jurisdiction to enjoin the sale of personal property under an execution, where the complainants claim the property as owners, and charge fraud in the sale of it to them by the defendant in execution, and collusion between him and the judgment creditor, in the procurement of the judgment, and otherwise, and they are without a complete remedy at law: McFarland v. Dilly, 5 W. Va. 135.

If an injunction to restrain an execution sale of goods is issued at the suit of an alleged purchaser from the judgment debtor, and the defendant files a petition alleging that the value of the goods will depreciate if not sold, the court may order their sale, and that the proceeds be held to await the determination of the injunction suit: Wenzel v. Milbury, 93 Md. 427, 49 Atl. 618.

VI. Sale Under Subsequent Execution.

If an execution has been levied on personalty, which is subsequently seized under another execution, a court of equity will not enjoin the sale under the latter, but will leave the complainant to his common-law remedies which are complete: Endres v. Lloyd, 56 Ga. 547. And the possession or right of possession acquired by a purchaser of personal property sold under execution will enable him to assert a legal remedy against one who converts it, by another sale under a subsequent execution, and a court of equity will not enjoin such sale: Boyce v. Waller, 9 Dana, 478.

VII. Prior Encumbrance.

If personal property is taken in execution and a third person applies to a court of equity to enjoin the sale on the ground of a prior encumbrance, the court has no jurisdiction in such a case, the rule being that a court of equity cannot interfere when the plaintiff claims as an encumbrancer merely, and when he claims as owner of the property, it can only interfere in cases where, from the peculiar nature of the property and surrounding circumstances of the case, the remedy at law is incomplete: Bowyer v. Creigh, 3 Rand. 25; Rollins v. Hess, 27 W. Va. 570.

VIII. Partnership Property.

Whether equity has jurisdiction to restrain the sale of the property of a partnership under an execution against one of the partners seems to be an unsettled question. The early cases in the state of New York deny that equity has jurisdiction: Moody v. Payne, 2 Johns. Ch. 548; Mowbray v. Lawrence, 22 How. Pr. 107. But

more recently it has been decided in that state that an injunction ought to issue whenever it is shown that the partner against whom the writ issued has, in fact, no interest in the property about to be sold: Turner v. Smith, 1 Abb. Pr., N. S., 304. In California it has been decided that the complainant is not entitled to restrain such sale, unless he shows that the injury would be irreparable, and that this must appear by a clear showing of the complainant's right to the property, and the defendant's insolvency: More v. Ord, 15 Cal. 204. In Ohio, a sale under execution against one of the partners will be stayed in equity, at the instance of the others, until an accounting can be had and his interest ascertained: Place v. Sweetzer, 16 Ohio, 142; Sutcliffe v. Dohrman, 18 Ohio, 181, 51 Am. Dec. 450. A creditor of a partnership who has attached its property is entitled to protection against a precedent judgment or execution against the firm, which is as against his interests, invalid and unenforceable, and should be awarded an injunction to protect the property from such antecedent judgment or execution: Schuster v. Rader, 13 Colo. 329, 22 Pac. 505.

IX. Exempt Property.

A number of cases maintain that an injunction will lie to restrain the execution sale of property which by law is exempt from sale, the presumed reason for the rule being that the remedy at law is inadequate, and that the officer is wrongfully depriving the debtor of his property under an illegal claim of right: Cunningham v. Conway, 25 Neb. 615, 41 N. W. 452; Nichols v. Claiborne, 39 Tex. 363; Stein v. Frieberg, 64 Tex. 271. And in Smith v. Gufford, 36 Fla. 481, 51 Am. St. Rep. 37, 18 South. 717, it was held that a bill in equity alleging that complainant therein was the head of a family residing in the state, that he did not own personalty exceeding the statutory limit of exemption, that a distress warrant for rent was levied upon his personalty, other than farm products raised upon the land, for the use of which rent was due, that the property levied upon was exempt from execution, and praying for an adjudication of his right of exemption, and that such property be set aside to him as exempt, and that an injunction be granted to restrain the sale of such property under the warrant is sufficient to authorize a court of equity to grant the relief prayed for.

Other cases, however, deny this doctrine, maintaining that an injunction will not issue to restrain the sale of exempt personal property, although the defendant is prevented by causes over which he has no control from giving the required notice of his claim of exemption and filing his schedule before the sale. His remedy in such case is by application to the court to stay proceedings under the execution until the claim for exemption can be made and determined: Driggs' Bank v. Norwood, 49 Ark. 136, 4 Am. St. Rep. 30, 4 S. W. 448. Again, in Parsons v. Hartman, 25 Or. 547, 42 Am.

St. Rep. 803, 37 Pac. 61, 30 L. R. A. 98, it was decided that a judgment debtor has no right to enjoin the sale of his personal property under execution on the ground that it is exempt from sale by law, unless the property possesses a special value to the judgment debtor alone, such as a keepsake or memento of some kind, the loss of which cannot be compensated in damages. The same rule was applied in Bailey v. Wade, 24 Mo. App. 186, on the ground that the judgment debtor had a complete and adequate remedy at law, because the officer, especially after notification that the property was exempt, became a trespasser in making the sale, and he and the sureties on his bond would be liable as for a conversion.

EX PARTE ALVAREZ.

[50 Fla. 24, 39 South. 481.]

PARDONS—Compliance With Conditions.—If a criminal accepts a pardon he accepts it subject to all its valid conditions and limitations, and will be held bound to a compliance therewith. (p. 104.)

PARDONS—Conditions Complied With.—If a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions thereof, the effect of the pardon becomes the same as though it were by its terms full and absolute. (p. 104.)

PARDONS—Revocation.—Before delivery and acceptance, a pardon may be revoked by the officer or body granting it; but if the pardon is not void in its inception, it cannot be revoked for any cause after its delivery and acceptance are complete. It then becomes a valid and operative act, of the benefits of which the recipient can be deprived only by some appropriate legal proceeding. (p. 104.)

PARDONS—Violation of Conditions.—If a prisoner has accepted a conditional pardon, and been released from imprisonment by virtue thereof, but has violated, or failed to perform, the condition, or conditions, or any of them, the pardon, in case of a condition precedent, does not take effect, and in case of a condition subsequent, becomes void, and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or as much thereof as he has not suffered at the time of his release. (p. 104.)

PARDONS—Conditions—Acceptance.— Sometimes conditional pardons expressly provide that upon violation of the condition the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence, and such stipulation, upon acceptance of the pardon, becomes binding upon the convict, and authorizes his arrest and recommitment upon the terms imposed, and in the manner and by and through the official authority as stipulated in the pardon. (pp. 104, 105.)

PARDONS—Violation of Conditions.—If a convict has been released under a conditional pardon, his rearrest and recommitment

to his original sentence cannot be had upon the mere order of the pardoning power alone, unless such course is provided by statute or by the express terms of the pardon. (p. 105.)

PARDONS—Conditional—Right to Hearing.—The convict, receiving a conditional pardon, upon his rearrest for a violation of its conditions is entitled to a hearing before some court of general criminal jurisdiction, in order that he may show that he has performed the conditions of the pardon, or that he has a legal excuse for not having done so, or that he is not the same person who was convicted, and on such a hearing the court may, in its discretion, take the verdict of a jury as to the facts involved. But the criminal is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted. Such inquiry is preferably to be held before the court that originally tried and convicted the criminal, but may properly be had before any court of the state of general jurisdiction. (p. 105.)

PARDONS—Breach of Condition—Prosecution by Indictment. Unless the act constituting the violation of a condition in a pardon is in itself a criminal offense, the violation of the condition is not ground for a prosecution by indictment. (p. 105.)

PARDONS—Breach of Condition—Procedure.—A proceeding to test the question whether there has been a breach of the conditions of a pardon is purely informal, and the established practice is for some court of general jurisdiction, upon having its attention called, by affidavit or otherwise, to the fact that a pardoned convict has violated, or failed to comply with, the conditions of his pardon, to issue a rule, reciting the original judgment of conviction, and sentence, the pardon and its conditions, and the alleged violation of, or noncompliance with, the conditions thereof, and requiring the sheriff to arrest the convict and bring him before the court, to show cause why the original sentence imposed upon him should not be executed. A copy of such rule should be served upon the convict at the time of his arrest, and when brought before the court upon such rule, if the prisoner denies that he is the same person who was convicted, sentenced and pardoned, he is entitled to have a jury summarily impaneled to try such issue, but if his identity is not denied, all the other facts and issues can be heard and tried by the court alone, unless the latter shall see proper, for his own satisfaction, to submit the facts to a jury for determination, and if it be found upon such investigation that there has been no violation of the conditions of the pardon, or if the convict shall show to the satisfaction of the court some valid excuse for such violation, he should be discharged from custody; but if the violation of the conditions of the pardon is established to the satisfaction of the court without any valid excuse therefor, the convict should be remanded to custody and ordered to have the original sentence imposed upon him duly executed, or so much thereof as has not already been suffered by him. Such inquiry and proceedings may properly be had by habeas corpus. (pp. 105, 106.)

Long & Fielding, for the plaintiff in error.

W. H. Ellis, attorney general, B. P. Calhoun, state attorney, and D. M. Gornto, for the state.

[32] TAYLOR, J. This cause being one of first impression in this court, and involving, as it does, the law governing

the effect of a conditional pardon and its acceptance by the convict, and of a violation of its conditions, and the proper procedure upon a violation thereof, we have given it exhaustive consideration, and find the law on the subject so concisely and accurately stated at page 595 et seq. of volume 24 of American and English Encyclopedia of Law, second edition, that we cannot do better than to quote what is there said as being the law: "It is settled law that, where a criminal accepts a pardon, he accepts it subject to all its valid conditions and limitations, and will be held bound to a compliance therewith.

"Where a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions thereof, the effect of the pardon becomes the same as though it were by its terms full and absolute.

"Before delivery and acceptance a pardon may be revoked by the officer or body granting it; but if the pardon is not void in its inception, it cannot be revoked for any cause after its delivery and acceptance are complete, for then it has passed beyond the control of the officer or body who granted it, and becomes a valid and operative act, of the benefits of which its recipient can be deprived only in some appropriate legal proceeding.

"Where a prisoner has accepted a conditional pardon and has been released from imprisonment by virtue thereof, [33] but has violated or failed to perform the condition (conditions, or any of them), the pardon, in a case of a condition precedent, does not take effect, and in case of a condition subsequent, becomes void, and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or as much thereof as he had not suffered at the time of his release.

"Sometimes conditional pardons expressly provide that, upon violation of the condition, the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence. Such stipulations, upon acceptance of the pardon, become binding upon the convict and authorize his rearrest and recommitment upon the terms imposed"; and we will add, authorize such arrest and recommitment in the manner and by or through the official authority as stipulated in the pardon.

"Where a convict has been released under a conditional pardon, his rearrest and recommitment to his original sen-

tence cannot be had upon the mere order of the governor (or board of pardons) alone, unless such a course is provided by statute, or by the express terms of the pardon.

"The convict (in the absence of a statute or of express provisions in the pardon to the contrary) is entitled to a hearing before some court of general criminal jurisdiction in order that he may show that he has performed the condition of the pardon, or that he has a legal excuse for not having done so, or that he is not the same person who was convicted; and on such a hearing the court may, in its discretion, take the verdict of a jury as to the facts involved. But the criminal is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted."

[34] Such proceeding and inquiry are preferably to be had before the court that originally tried and convicted the criminal, but may properly be had before any court of the state of general criminal jurisdiction.

"In the absence of a statute, and unless the act constituting the violation of a condition in a pardon is in itself a criminal offense, the violation of the condition is not a ground for a prosecution by indictment."

The proceeding to test the question whether or not there has been a violation of, or noncompliance with, the condition or conditions of a pardon is purely informal. The established practice at the common law and in the American states, in the absence of statutory regulation and in the absence from the pardon itself of express stipulations for that purpose, is for some court of general criminal jurisdiction upon having its attention called, by affidavit or otherwise, to the fact that a pardoned convict has violated, or failed to comply with, the condition or conditions of his pardon, to issue a rule, reciting the original judgment of conviction and sentence, the pardon and its conditions and the alleged violation of, or noncompliance with, the condition or conditions thereof, and requiring the sheriff to arrest the convict and bring him before the court to show cause, if any he can, why the original sentence imposed upon him should not be executed. A copy of such rule should be served upon the convict at the time of his arrest. When brought before the court upon such rule, if the prisoner denies that he is the same person who was convicted, sentenced and pardoned, he is entitled to have a jury summarily impaneled to try such issue, but if his identity

is not denied, all the other facts and issues can be heard and tried by the judge alone, unless the judge, solely within his discretion, shall see proper, for his own satisfaction, to submit the facts to a jury for [35] determination. If it be found upon such investigation that there has not been a violation of, or noncompliance with, the condition or conditions of the pardon, or if the convict shall show to the satisfaction of the court some valid reason or excuse for such violation or noncompliance, he should be discharged from custody, but if the violation of, or noncompliance with, the condition or conditions of the pardon be shown to the satisfaction of the court, without any legal reason or excuse therefor, the convict should be remanded to custody and ordered to have the original sentence imposed upon him duly executed, or so much thereof as has not been already suffered by him.

In the absence from the statutes of Florida of any provision authorizing the state board of pardons to ascertain and determine whether or not there has been a violation of, or noncompliance with, the condition or conditions of a pardon, and to order the rearrest of the convict and the execution upon him of the original sentence, and in the absence from the pardon itself of express stipulations so authorizing such board, it has no authority to inquire into or pass upon the question of a violation of the condition or conditions of such pardon, or to order the rearrest of the convict, or to subject him to the execution of the original sentence imposed, and the order of the board of pardons made in this case under the circumstances here, undertaking to adjudge a violation of the conditions of his pardon by the plaintiff in error and revoking such pardon, and ordering the recommitment of the plaintiff in error in execution of his original sentence is a nullity. The return of the sheriff to the writ of habeas corpus, however, sets up and exhibits the original sentence and the conditional pardon, as well as the subsequent order of the board of pardons revoking same, and [36] alleges that he, the sheriff, detains the plaintiff in error in custody under and by virtue of the judgment and all of such orders. The conditional pardon granted to the plaintiff in error in express terms authorizes any sheriff of the state to rearrest him upon his violating the conditions of the pardon. It became the duty, then, of the sheriff to arrest the plaintiff in error upon its being made known to him from any responsible source that he had violated or was violating the conditions

of his pardon, and to detain him in custody until such alleged violation could be inquired into and determined in the proper manner by the proper authority, and to bring such alleged violation promptly to the attention of some court of general criminal jurisdiction to be disposed of. It having been brought to the attention of the sheriff in this case by the order of the board of pardons that the plaintiff in error had violated the conditions of his pardon, the sheriff acted within his authority in arresting and detaining him in custody, notwithstanding the fact that the order of the board of pardons expressly ordering such arrest was, of itself, a nullity, because the terms and stipulations of the pardon itself, by which the plaintiff in error was completely bound, expressly authorized such arrest and detention.

The record before us does not show whether or not the judge below in the habeas corpus proceeding instituted any inquiry into the truth of the alleged violation by the plaintiff in error of the conditions of his pardon; such inquiry could have been done, and should have been done, under the circumstances of the case, in the habeas corpus proceeding, and inasmuch as the plaintiff in error has the right to have such inquiry made and determined by the proper authority, the judgment of the court below must be reversed and remanded in order that such inquiry may be properly made and passed upon.

[37] Inasmuch as it appears from the record in the case that the judge of the circuit court for Bradford county in the eighth judicial circuit is disqualified to hear or determine the questions involved, by reason of which disqualification the habeas corpus proceedings from which this writ of error was taken, were heard and disposed of by the judge of the fourth judicial circuit in and for Duval county, it is ordered that the judgment of the court below in this cause be, and the same is hereby, reversed, and the cause is hereby remanded to the judge of the circuit court of the fourth judicial circuit, with directions that in such habeas corpus proceeding he shall make inquiry into the truth of the alleged violation by the plaintiff in error of the conditions of his pardon in the manner herein pointed out, and if such alleged violation of the conditions of such pardon shall be therein established to his satisfaction, that then the plaintiff in error be remanded to custody, and that the original sentence imposed upon him shall be fully executed, but if the alleged

violations of the conditions of such pardon shall not be established, or if there be shown any satisfactory legal excuse for such violation, he shall be discharged from further custody; and it is further ordered that the plaintiff in error shall be detained in custody or under the conditions of his supersedeas and appearance bond until such inquiry can be made and determined, and that the state attorney for the eighth judicial circuit shall be notified by the judge of the fourth judicial circuit of the time and place when and where he will hear and determine the matter, and that he be given an opportunity to produce witnesses to establish, if he can, the truth of the alleged violation of the conditions of the pardon, and that the plaintiff in error [38] be accorded the like privilege of producing witnesses to refute such alleged violation if he can. The cost of this writ of error proceeding to be taxed against the county of Bradford. See the authorities, both English and American, collated in the notes to volume 24 of American and English Encyclopedia of Law, second edition, on page 595 et seq.

Hocker and Parkhill, JJ., concur.

Shackleford, C. J., and Cockrell and Whitfield, JJ., concur in the opinion.

CONDITIONAL PARDONS.

I. Constitutionality of Statutes Concerning, 108.
II. Power to Grant, 109.
III. Conditions.
a. Generally, 110.
b. Leaving State, 111.
c. Use of Liquor, 112.
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I. Constitutionality of Statutes Concerning.

The constitutionality of statutory provisions relating to the granting of conditional pardons have generally been upheld by the courts. Thus, a statute declaring that the governor shall, in commuting the sentences of convicts, annex a condition to the effect that if any convict so commuted shall, during the period between the date of his discharge, by reason of such commutation, and the date of the expiration of the full term for which he was sentenced, be convicted of any felony, he shall, in addition to the penalty imposed for such felony, be compelled to serve the remainder of the term commuted is not in conflict with a constitutional provi-

sion, providing that the governor shall have power to grant commutations upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law: In re Whalen, 65 Hun, 619, 19 N. Y. Supp. 915. A statute providing that the governor may parole a convict for good behavior, and that on failure of such convict to observe the conditions of his parole the governor shall have authority to direct his rearrest and return to custody, and that such convict shall thereupon be required to carry out the sentence of the court, is not violative of the constitutional guaranty that no warrant shall be issued to seize a person without probable cause, supported by oath or affirmation, since being a felon at large by executive clemency, which he has accepted on conditions included therein, the convict upon violation of such conditions is merely an escaped convict, and not entitled to invoke such constitutional guaranty: Fuller v. State, 122 Ala. 32, 82 Am. St. Rep. 1, 26 South. 146, 45 L. R. A. 502. Or a statute providing that, in any case in which the governor is authorized by the constitution to grant a pardon, he may, with the advice of the council, upon the petition of the person convicted, grant a conditional pardon, and that where the conditions of the pardon are violated, he shall be arrested, and the governor and council shall examine the case of such convict, and if it appears by his own admission or by evidence that he has violated the conditions of his pardon, the governor, with the advice of the council, shall order the convict to be remanded to, and confined for, the unexpired term of his sentence, is constitutional, and the governor and council may order the convict to be so remanded and confined without notice to him, and without giving him an opportunity to be heard: Kennedy's Case, 135 Mass. 48.

II. Power to Grant.

Generally, under constitutional or statutory provisions conferring the pardoning power upon the governor, he may grant conditional pardons, or parole convicts: Fuller v. State, 122 Ala. 32, 82 Am. St. Rep. 1, 26 South. 146, 46 L. R. A. 502; People v. Potter, 1 Park. Cr. Rep. 47; State v. Fuller, 1 McCord, 178. The President has the same power under the constitution of the United States: Ex parte Wells, 18 How. 307, 15 L. ed. 421; United States v. Klein, 13 Wall. 128, 20 L. ed. 519. The governor has the constitutional power to pardon convicts upon such conditions as he may choose to impose, so long as they are legal: Ex parte Hunt, 10 Ark. 284. If the power to grant pardons is conferred upon the governor in unrestricted terms, he has authority to grant every kind of pardon known to the common law. A pardon granted by him may be full and absolute, or partial and conditional, provided no condition of the pardon is illegal, immoral or impossible: In re Discharge of Convicts, 73 Vt. 414, 51 Atl. 10. While the governor has constitutional power to grant conditional

pardons, the conditions, to be operative, should appear on the face of the pardon: Ex parte Reno, 66 Mo. 266, 27 Am. Rep, 337. The governor may annex any condition, whether precedent or subsequent, not forbidden by law, and it lies on the grantee to perform it, and if he does not perform, in case of a condition precedent, the pardon does not take effect, and of a condition subsequent, becomes void. If the condition is not performed, the original sentence remains in full force, and may be carried into effect: Flavell's Case, 8 Watts & S. 197.

The pardoning power conferred upon the governor by the constitution cannot be taken away or restricted by the legislature, nor can a like power be given by the legislature to any other officer or authority: In re Discharge of Convicts, 73 Vt. 414, 51 Atl. 10.

III. Conditions.

a. Generally.—A pardon may be partial or subject to conditions, but the conditions must be lawful: United States v. Six Lots of Ground, 1 Woods, 234, Fed. Cas. No. 16,299. A pardon may impose any condition that the governor thinks proper, provided it is neither immoral, impossible nor illegal: State v. Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065, 19 L. R. A. 783. Such conditions must be reasonable and compatible with the genius of our constitution and laws, and a void condition will nullify the pardon: Commonwealth v. Haggerty, 4 Brewst. 326. In granting a conditional pardon the conditions, to be operative, should appear on the face of the paper: Ex parte Reno, 66 Mo. 266, 27 Am. Rep. 337. An indefinite suspension of the sentence of a prisoner on conditions amounts to a conditional pardon: State v. Hunter, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510. A pardon may have annexed to it a condition either precedent or subsequent, upon the performance of which the validity of the pardon will depend: Commonwealth v. Haggerty, 4 Brewst. 326. The duration of a condition subsequent annexed to a pardon will be limited to the term of the grantee's sentence, unless an intention to extend it beyond that term is manifest from the nature of the condition or the language in which it is imposed: Huff v. Dyer, 4 Ohio C. C. 595.

A pardon containing a condition that the person to whom it was granted should not claim any of his property, or the proceeds thereof, that had been sold by the order, judgment or decree of a court, under the confiscation laws of the United States, is a bar to his claim: United States v. Six Lots of Ground, 1 Woods, 234, Fed. Cas. No. 16,299.

A provision in a conditional pardon that a violation of the conditions therein should work a forfeiture of the prisoner's statutory right to diminution of sentence for good conduct is unauthorized and void and will not have that effect even though assented to by the prisoner: State v. Hunter, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510. Where a convict has served his term, and a pardon is subsequently

issued solely to restore him to citizenship, a condition therein that it might be revoked if the grantee should violate any of the criminal laws of the state is void, as the constitution provides that no one can be deprived of his rights as a citizen in regard to voting, sitting upon juries, holding office, and testifying in court, except on conviction of felony: Taylor v. State, 41 Tex. Cr. Rep. 148, 51 S. W. 1106.

In one case, at least, it has been decided that the governor cannot pardon upon condition and that a pardon granted upon condition becomes at once absolute: Commonwealth v. Fowler, 4 Call, 35.

No doubt if the conditions of the pardon are immoral, impossible or illegal, they are void, and render the pardon at once absolute: People v. Potter, 1 Edm. Sel. Cas. 235.

b. Leaving State.—A condition in a pardon that the grantee leave the state or country forthwith is a reasonable condition, and means a departure and permanent absence during at least the term of the sentence: Commonwealth v. Haggerty, 4 Brewst. 326. And if the convict in violation of such condition in his pardon is found within the state afterward, he is liable to arrest as an escaped convict: Ex parte Lockhart, 1 Disn. 105. A pardon on condition that the prisoner take up and maintain his residence out of the state during the balance of his natural life does not impose any impossible, immoral or illegal condition and is therefore valid and enforceable: State v. Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065, 19 L. R. A. 783.

The condition in the pardon may be banishment from the United States, and on a breach of the condition the pardon becomes void, and the criminal may be remanded to his original sentence: People v. Potter, 1 Park. Cr. Rep. 47. If the condition in the pardon is that the grantee shall leave the state in two weeks, and he neglects to do so, the pardon must be considered as void: State v. Fuller, 1 McCord, 178. It has been decided in one case that a convict pardoned upon condition that he leave the state, and he complies with such condition, but afterward returns to the state, is not liable to be taken and imprisoned under the former conviction: Ex parte Hunt, 10 Ark. 284. It has also been held that a convict whose term of sentence is unexpired, if pardoned on condition that he leave the state and nevermore return, need not leave the state, as such condition is void and the pardon becomes absolute: Commonwealth v. Hatsfield, 1 Clark (Pa.), 177. This ruling is, however, opposed to the great weight of authority which maintains that a condition in a pardon that the convicted person shall leave the state and never again return to it, is constitutional and valid: Ex parte Hamkins, 61 Ark. 321, 54 Am. St. Rep. 209, 33 S. W. 106, 30 L. R. A. 736; State v. Smith, 1 Bail. 283, 19 Am. Dec. 679; State v. Barnes, 32 S. C. 14, 17 Am. St. Rep. 832, 11 S. E. 611, 6 L. R. A. 743. In such case, if the person pardoned violates the terms of his pardon, and returns to the state, he will be remitted to his former sentence, even though such sentence deprives him of his life: State v. Smith, 1 Bail. 283, 19 Am. Dec. 679. If such pardoned convict returns

to the state six years after having accepted such conditional pardon, he may be recommitted to prison, to serve the remainder of his unexpired term: State v. Barnes, 32 S. C. 14, 17 Am. St. Rep. 832, 10 S. E. 611, 6 L. R. A. 743.

c. **Use of Liquor.**—A condition annexed to the pardon of a convict that he shall abstain from the use of intoxicating liquors as a beverage is valid: Arthur v. Craig, 48 Iowa, 264, 30 Am. Rep. 395; Huff v. Dyer, 1 Ohio C. C. 595. It is within the power of the governor to grant a commutation of sentence upon the express condition that the person whose sentence is commuted shall abstain from the use of intoxicating liquors for five years from the date of the commutation, and in case such condition is not complied with, that the prisoner shall be compelled to serve the portion of his term then unserved, and a violation by the prisoner of such condition deprives the commutation of all force and effect, and restores to the original sentence the same force and effect as if the commutation had not been granted: People v. Burns, 77 Hun, 92, 28 N. Y. Supp. 300, affirmed 143 N. Y. 665, 39 N. E. 21.

IV. Compliance with Conditions.

A conditional pardon when accepted by a convict becomes a contract between him and the state: People v. Potter, 1 Edm. Sel. Cas. 235; Lee v. Murphy, 22 Gratt. 789, 12 Am. Rep. 563; In re Greathouse, 4 Saw. 487, Fed. Cas. No. 5741. And a conditional pardon becomes void and is vacated upon failure of the convict to perform the whole of the condition: State v. Addington, 2 Bail. 516, 23 Am. Dec. 150. If a pardon is granted with conditions annexed, the conditions must be performed before the pardon is of any effect: Waring v. United States 7 Ct. of Cl. 501; and one who claims the benefit of the pardon must be held to a strict compliance with its conditions. Therefore, the requirement in a pardon of an oath to be taken after its issue is not met by showing an oath of the same character taken before the pardon was granted: Haym v. United States, 7 Ct. of Cl. 443. A pardon on condition of paying a fine and costs imposed with the sentence of imprisonment is wholly inoperative until such fine and costs are paid: In re Ruhl, 5 Saw. 186, Fed. Cas. No. 12,124; and a commutation granted on condition that the grantee should pay all costs assessed against him in a certain prosecution, and should give a pledge to forever refrain from engaging in the saloon business in violation of law, is not effective, if the conditions are not complied with: McKay v. Woodruff, 77 Iowa, 413, 42 N. W. 428.

One who claims the benefit of a pardon expressed to be granted on conditions must make clear affirmative proof that such conditions have been complied with: Haym v. United States, 7 Ct. of Cl. 443; Waring v. United States, 7 Ct. of Cl. 501.

And it lies on the grantee of a conditional pardon to perform the condition. If he does not, in case of a condition precedent the pardon does not take effect, or in case of a condition subsequent failure

to perform renders the pardon void, and if the condition is not performed the original sentence remains in full force and may be carried into effect: Flavell's Case, 8 Watts & S. 197. In any case, by the nonperformance of the conditions of a pardon accepted by a convict, the pardon becomes void, and the convict is liable to be remitted to imprisonment under his original sentence: In re Discharge of Convicts, 73 Vt. 414, 51 Atl. 10. If the condition annexed to a pardon is not voluntarily complied with, the original sentence may be re-enforced: People v. Potter, 1 Edm. Sel. Cas. 235. If a prisoner has been granted a pardon on condition that he leave the state forthwith and never return to it, he is not entitled to discharge from arrest on habeas corpus if it appears that he did not accept the pardon in good faith, and that, after his release from prison, and before his rearrest, ample opportunity was given him to leave the state, of which he did not avail himself: Ex parte Marks, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109.

But if a prisoner has been pardoned on condition that he leave the United States within a limited time, and he does not comply with such condition, and is afterward rearrested for not so doing, he may, on showing to the court that he was insane during the time since his discharge, be again discharged on condition of his departing within the same period for the day of his second discharge: People v. James, 2 Caines, 57.

V. Breach of Conditions.

a. Right to Hearing.—There is considerable incongruity in the cases as to the procedure to be followed upon a breach of the condition in a pardon, and some of the cases maintain that upon the violation of the conditions in the pardon, the governor is the sole judge as to whether such conditions have in fact been violated, and that he has the power, without any intervention, to order his recommitment to prison to serve the unexpired portion of his term: Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047. In such case it has been held that the governor may order the convict to be remanded and confined without notice to him, and without giving him an opportunity to be heard: Kennedy's Case, 135 Mass. 48. In some cases it is considered that a convict who has been paroled upon violating the condition of his parole becomes merely an escaped convict, and may upon the direction of the governor be rearrested and returned to custody, and required to serve out the unexpired part of the sentence of the court as though no parole had been granted: Fuller v. State, 122 Ala. 32, 82 Am. St. Rep. 1, 26 South. 146, 45 L. R. A. 502. In State v. Hunter, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510, it was decided upon the authority of Arthur v. Craig, 48 Iowa, 264, 30 Am. Rep. 395, and other cases that the governor has power to grant a prisoner an indefinite suspension of sentence, which is in effect a conditional pardon, providing for revocation at his pleasure, and no judicial determination of a violation of the

condition is essential to authorize the governor to terminate the suspension and recommit the prisoner.

In other cases it has been as flatly decided that although the pardoning power is vested exclusively in the governor, yet a pardoned convict charged with having violated the conditions of his release must be rearrested, held and tried in the same manner as other offenders against the law, and that a statute providing for the rearrest and remanding the convict without warrant, upon the violation by him of the condition of his pardon, and without a preliminary examination, is unconstitutional and void: People v. Moore, 62 Mich. 496, 29 N. W. 80. It has also been decided that a convict who has received and accepted a conditional pardon cannot be arrested and remanded to suffer his original sentence because of an alleged nonperformance of the condition upon the mere order of the governor. He is entitled to a hearing before the court in which he was convicted, or some court of general criminal jurisdiction, and an opportunity to show that he has performed the condition of his pardon: State v. Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065, 19 L. R. A. 783. Of course, the cases which maintain this rule wholly ignore such cases as we have heretofore cited supporting the contrary doctrine, and they also ignore such cases as State v. Chancellor, 1 Strob. 347, 47 Am. Dec. 557, holding that a prisoner pardoned on condition that he leave the state and not return, upon returning is remitted to his original sentence, and is not entitled to a trial by indictment, or on a written rule to show cause, or to receive any more formal notice that an application would be made to pass sentence on him than when his sentence was originally passed.

In a late case in Vermont—In re Discharge of Convicts, 73 Vt. 414, 51 Atl. 10—it was held that at common law a convict unlawfully at large by reason of the violation of the conditions of his pardon, or otherwise, might be brought to the bar and remanded to imprisonment under his original sentence, and that in the absence of valid statutory procedure, and without resort to the procedure of the common law a convict conditionally pardoned or discharged cannot be remitted to imprisonment under his former sentence, except in conformity to a valid provision in that respect contained in the pardon. If a conditional pardon accepted by the convict contains a provision that upon noncompliance with the conditions the convict may be apprehended and remitted to his former custody upon the governor's warrant issued for that purpose, such provision is binding, and the governor may proceed in accordance therewith.

In Ex parte Brady, 70 Ark. 376, 68 S. W. 34, it appeared that Brady was convicted of selling liquor without a license, and pardoned on condition that he would not again commit the same offense, but in a short time thereafter he violated the condition of the pardon. "The governor of the state thereupon issued his proclamation, declaring that the pardon was null and void, by reason of the violation of the condi-

tion upon which it was granted, and that the judgments against Brady were in full force. Counsel for Brady say that the governor 'had no more authority to revoke the pardon than a scavenger,' and that his proclamation was without effect. It may be true that the governor had no power to revoke his pardon, but the pardon having been granted on condition that Brady would not again sell liquor without a license, and he having violated that condition, and having pleaded guilty to a charge of selling liquor without a license, and the judgment of a court of competent jurisdiction been rendered against him, convicting him of that crime, and it being thus, in effect, judicially established that Brady had, subsequent to the pardon, violated the condition upon which it was granted, the pardon by its own terms became of no effect, and did not protect Brady from the enforcement of the judgments against him. The proclamation of the governor did not revoke the pardon. It had been annulled by the act of Brady, judicially established, and the proclamation only gave notice of that fact. It might have been more regular to have first brought Brady before the circuit court to show cause why judgment should not be enforced against him before proceeding to enforce them, but the failure to do so was an irregularity which furnishes no ground for his discharge, as it clearly appeared on the trial by the circuit judge before whom Brady was brought by writ of habeas corpus that the pardon had been annulled by his own act, that the judgments against him were in full force and effect, and that he had no cause to show against their enforcement: Ex parte Brady, 70 Ark. 379, 68 S. W. 34.

Some cases hold that the proper practice for the remanding of the convict to jail for the breach of a condition in a pardon is by a rule to show cause why he should not be recommitted: Commonwealth v. Haggerty, 4 Brewst. 326; State v. Barnes, 32 S. C. 14, 17 Am. St. Rep. 832, 10 S. E. 611, 6 L. R. A. 743. And the power to remand him can be exercised by the court in which he was convicted, or by any court of superior criminal jurisdiction: People v. Potter, 1 Park. Cr. Rep. 47, 1 Edm. Sel. Cas. 235. And the fact that the grantee of a pardon has violated a condition annexed to it may be found without the intervention of a jury: Huff v. Dyer, 4 Ohio C. C. 595. However, on such hearing the court may, in its discretion, if in doubt as to the facts, take the verdict of a jury, but the person pardoned is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted, if he pleads that he is not: State v. Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065, 19 L. R. A. 783.

In People v. Burns, 77 Hun, 92, 28 N. Y. Supp. 300, affirmed 143 N. Y. 665, 39 N. E. 21, it appeared that a person was seized by a warden of a prison upon a charge of an alleged violation of the condition of a commutation of sentence and consigned to imprisonment under his original sentence. Thereafter a writ of habeas corpus was sued out in his behalf, and upon return thereof his objections to the commitment

were in fact sustained on the ground that it was not competent for the warden to seize and recommit him without a hearing on the question of a violation of the condition of his commutation, and the defendant was discharged from the custody of the warden, but an order was then made requiring him to show cause forthwith why he should not be remanded to the state prison under his original sentence for the violation of the condition of his commutation, and that in the meantime he be delivered to the sheriff and held by him until so remanded to prison, or discharged according to law. The inquiry under such order to show cause resulted in a verdict by a jury, pursuant to which the prisoner was remanded to the custody of the warden of the state prison under the original sentence imposed upon him to serve the unexpired portion thereof, because of his violation of the condition of his commutation of sentence, and it was held upon this state of facts that the defendant had nothing to complain of under such course of procedure, sustained by precedent: People v. James, 2 Caines, 57, and People v. Potter, 1 Park. Cr. Rep. 47, 1 Edm. Sel. Cas. 235.

ATLANTIC COAST LINE RAILROAD COMPANY v. DEXTER.

[50 Fla. 180, 39 South. 634.]

CARRIERS—Evidence of Delivery of Freight.—The fact of the delivery of freight to a common carrier for transportation may be proven by oral testimony, although a receipt or bill of lading has been given by the carrier and is still in existence. (p. 117.)

CARRIERS—Limitation of Liability.—The acceptance by a shipper or his agent of a receipt or bill of lading containing a limitation of the carrier's liability is binding on him, when the limitation is not illegal or unreasonable, and it is not essential to the validity of such a limitation that it be shown that the shipper was aware of it, or that he had read it, or that it had been explained to him, or had his attention called to it, provided the carrier made use of no improper means to prevent his noticing or objecting to it and every shipper is exclusively presumed in such case to have read and assented to the provisions of the receipt or bill of lading given him, whether he in fact assented or not. (p. 118.)

CARRIERS OF LIVESTOCK—Care during Carriage—Burden of Proof.—If livestock is shipped by common carrier and the shipper assumes to take care of it during its transportation, he has the burden of proving that its loss was the result of the carrier's negligence, whether such negligence consists in failing to furnish proper cars, or in the transportation of the stock. (p. 119.)

CARRIERS OF LIVESTOCK—Limitation of Liability.—Provisions in contracts for the carriage of livestock limiting the amount for which the carrier is to be liable in any event for the complete loss of or injury to, such stock while in its charge, are universally recognized to be reasonable, valid and binding on the parties. (p. 120.)

TRIAL.—A Demurrer to the Evidence is properly overruled unless it sets forth all the evidence intended to be admitted thereby. (p. 120.)

J. E. Hartridge and J. B. Johnson, for the plaintiff in error.

184 TAYLOR, J. To H. F. Dexter, one of the plaintiffs, as a witness on his own behalf, the following question was propounded: "Did you, on or about the ninth day of February, 1904, deliver to the Central of Georgia Railroad Company a carload of horses and mules?" The defendant objected to this question on the ground that the written receipt or bill of lading for the stock is the best evidence of the delivery of same to the railroad company. The objection was overruled and the question allowed, which ruling is the second error assigned. The witness answered that "the Brady Union Stock Yards delivered this carload for me. We usually had them to deliver the stock." There was no error in permitting this question. The receipt or bill of lading, if any, given by the railroad company for freight delivered to it 185 for carriage, while strong evidence, is no better evidence of the abstract fact of such delivery than the testimony of a credible witness who knows of such delivery. No receipt or bill of lading may be issued at all, yet the fact of such delivery may exist without it, and may be testified to independently of a receipt or bill of lading for the goods delivered: Boykin v. State, 40 Fla. 484, 24 South. 141.

After the defendant had introduced in evidence without objection the two "Livestock Contracts" or bills of lading, under which it was admitted the railroad company received the stock for carriage and shipment, and had made H. F. Dexter, one of the plaintiffs, its witness, and had proved by him that he had received and ridden on a pass issued with such contract, the plaintiff's counsel, on cross-examination of said Dexter, propounded to him the following question: "Were you acquainted with the terms of this bill of lading, and did you agree to the same?" To this question the defendant objected on the grounds: 1. The bill of lading has already been admitted by them to be the contract under which said stock was shipped; 2. The plaintiffs accepted the benefits of the free pass under the contract; and 3. The railroad companies were induced to accept the said stock by the acquiescence of the plaintiffs to the terms of the said bill of lading; hence they are estopped to deny the acceptance of same. These objections were overruled and the question allowed, which ruling is assigned as error. The witness answered as follows: "I didn't know anything about the terms

of this bill of lading, neither did I agree to the same. Brady Union Stock Yards took the bill of lading. Usually they ship the stock, take the bill of lading, and then the bill of lading and pass are sent to the hotel, and I know nothing about it until the bill of lading [186] and pass get to the hotel." The court below erred in this ruling for various reasons.

The rule is quite generally settled in the United States that an acceptance by a shipper or his agent of a receipt or bill of lading containing a limitation of the carrier's liability is binding on him when the limitation is not illegal or unreasonable. And that it is not essential to the validity of such a limitation that it be shown that the shipper was aware of it, or that he had read it, or that it had been explained to him or his attention called to it, provided the carrier made use of no improper means to prevent his noticing or objecting to it. And that every shipper is conclusively presumed, in such a case, to have read and assented to the provisions of the receipt or bill of lading given him, whether he in fact assented or not: 5 Am. & Eng. Ency. of Law, 2d ed., pp. 293, 294, and numerous authorities there cited. The stock contract or bill of lading here inquired about had been admittedly received by the shipping plaintiffs, had been accepted and signed by their shipping agent, the Brady Union Stock Yard, and the plaintiff had admittedly received and ridden upon a free pass issued to him by the railroad company as a part of the contract of shipment, and no obstacles were shown to have been thrown in his way to prevent his fully familiarizing himself with the terms of the contract and each and every of its conditions. Under these circumstances it made no difference whether the plaintiffs ever expressly assented to the contract or not, or even read or knew of its terms and conditions; they are fully bound thereby, and are estopped from gainsaying or repudiating it.

What is here said disposes also of the assignment of error predicated upon the ruling of the court in permitting [187] one P. T. McGriff, a witness, and shipping agent for the plaintiffs, to testify to his nonassent to, and want of knowledge of, the terms and conditions of the second livestock contract or bill of lading involved in the case.

The court gave to the jury the two following charges:

1. "To plaintiffs' declaration in this case the defendant has filed two pleas: the first is a plea of general issue, and the second is a special or affirmative plea. (Here the court

read the pleas to the jury.) Under the first plea it devolves upon the plaintiffs to prove their case by a preponderance of the evidence. If you believe from the evidence that this stock sued for was delivered to the railroad company in good condition, and that when same reached Live Oak it was injured and damaged as alleged in plaintiffs' declaration, then the court instructs you that the plaintiffs have made out a prima facie case, and are entitled to recover unless the defendant can show that said stock was injured by its own inherent viciousness, or from some other cause not the result of their negligence and for which it is not responsible."

2. "If you find for the plaintiffs you should fix their damage at the value of said stock after it had reached Live Oak had same been uninjured." Both of these charges are erroneous. The first is erroneous because in the admitted contract of shipment between the parties it is expressly provided that the shipping plaintiffs or their agent assume to take care of the stock during its transportation. In such cases the great weight of authority holds that when the shipper assumes to take care of the stock during the transportation, he has the burden of proving that the loss was the result of the defendant company's negligence, whether the negligence consists in failing to furnish proper cars or in the transportation of the [188] stock. The reason for this rule is thus given by Elliott, C. J., in Terre Haute etc. R. Co. v. Sherwood, 32 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781, 17 L. R. A. 339: "The effect of this agreement is to place the animals in their (the shippers') immediate custody during transportation. Their agent is to care for them and is to do the things expressly specified. The animals were not, therefore, in the exclusive custody and control of the carrier, so that the case is not within the reason of the rule that the carrier, and not the shipper, has the burden of proof because the former has all the means of explanation and excuse at hand." The general rule referred to by Judge Elliott, to which the case of a shipper assuming the care of livestock during the transportation forms an exception, is the same rule that is discussed in Savannah etc. Ry. Co. v. Harris, 26 Fla. 148, 23 Am. St. Rep. 551, 7 South. 544; 5 Am. & Eng. Ency. of Law, 2d ed., p. 472, and cases cited in note 2 and p. 359. Our statute, chapter 4071 of the Laws of 1891, does not militate against this rule, since it does not cast the burden of proof upon, or presume negligence against, the carrier until it is shown, at least, that the injury com-

plained of was caused "by the running of the locomotives, or cars, or other machinery of the defendant company." In the case of the transportation of livestock, with the undisputed special contract before the court between the parties, admitted in this case, providing for the carriage of these animals, it was error for the court to charge the jury in effect that if the animals were in good condition when delivered to the railroad company and were found to be injured on their arrival at their destination, they could find for the plaintiffs, unless the defendant company could show that the injury was not caused by its negligence, or was caused by the innate viciousness [189] of the animals themselves. The burden was upon the plaintiff shippers of proving at least that the injury to the animals complained of resulted from the operation by the defendant company of its cars, or in the discharge of some other duty that devolved upon it under its contract of carriage with the shipper.

The second of said charges is erroneous, because it entirely ignores the provision in the admitted contract between the parties by which, in consideration of the reduced rates at which the carriers undertook to convey the freight, the amount of damages for which the companies were to be responsible for the complete loss or injury to such stock was limited in any event to not more than seventy-five dollars per head. The validiy of such provisions in freighting contracts between shippers and carries, particularly for the carriage of livestock, is almost universally recognized, and they are binding between the parties: 5 Am. & Eng. Ency. of Law, 2d ed., p. 328 et seq., and authorities there cited. Notwithstanding this, the court in this charge instructs the jury that they can assess the damage at the full value of the animals in an uninjured condition at their point of destination at Live Oak.

At the close of the evidence the defendant demurred to the evidence, but the court overruled such demurrer. This demurrer was defective in not stating all the evidence admitted thereby, and was, therefore, properly overruled: Mugge v. Jackson, 50 Fla. 235, 39 South. 157. In view of the evidence disclosed to us in the record here, the court erred in denying the defendant's motion for new trial on the ground that the verdict was not supported by the evidence. The plaintiffs failed to show when, where or how the injury occurred to his property, and failed utterly to prove any fact from which it could be presumed [190] even that such

injury occurred while such stock was in the hands of the defendant company. This being true, no case was made out against the defendant upon which a recovery could legally be had.

For the errors found the judgment of the court below is reversed at the cost of the defendant in error.

Hocker and Parkhill, JJ., concur.

Shackleford, C. J., and Cockrell and Whitfield, JJ., concur in the opinion.

The Limitation of Carriers' Liability in bills of lading is discussed in the monographic note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 74-134.

The Respective Duties of Carriers and shippers of livestock are discussed in the monographic note to Heller v. Chicago etc. Ry. Co., 63 Am. St. Rep. 548-566, and in the recent case of Southern Ry. Co. v. Webb, 143 Ala. 304, ante, p. 45. As to whether a presumption of negligence arises against a carrier when it delivers livestock in an injured condition, see Richmond etc. R. R. Co. v. Trousdale, 99 Ala. 389, 42 Am. St. Rep. 69; Terre Haute etc. R. R. Co. v. Sherwood, 132 Ind. 129, 32 Am. St. Rep. 239; St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104; Lindsley v. Chicago etc. Ry. Co., 36 Minn. 539, 1 Am. St. Rep. 692.

INSURANCE COMPANY OF NORTH AMERICA v. ERICKSON.

[50 Fla. 419, 39 South. 495.]

INSURANCE, FIRE—Interest of Insured.—A provision in a policy of fire insurance stipulating that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the interest of the insured was other than unconditional and sole ownership is material, valid and binding upon the parties to the contract. (p. 126.)

INSURANCE, FIRE—Interest of Insured—Bond for Title.—If an insured, prior to taking out a policy of fire insurance on property, executes to a third person a bond for title or contract for the sale and conveyance of the property, whereby he unqualifiedly obligates himself, his heirs, etc., to convey such property in fee to such third person by good and sufficient deed, free of all encumbrances, upon the payment by such vendee of definitely fixed sums of money at certain fixed times, and whereby such third person, vendee, unqualifiedly binds himself, his heirs, etc., to pay the sums agreed upon at the dates specified, such bond or contract renders the vendor no longer the sole and unconditional owner of the property, but converts him into a trustee holding the legal title in trust for the vendee as security for the payment of the agreed purchase price, and, unless such status

toward the property is provided for by agreement between the insurer and the insured, duly indorsed on the policy or added thereto, such policy is null and void when it contains a provision that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the interest of the insured be other than unconditional or sole ownership. (p. 127.)

INSURANCE, FIRE—Unconditional Ownership.—The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership, within the true meaning of the ordinary clause upon that subject in fire insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs. (pp. 127, 128.)

A. W. Cockrell & Son and King, Spaulding & Little, for the plaintiff in error.

G. M. Robbins, for the defendant in error.

420 TAYLOR, J. The pleadings and issues in these two causes are substantially the same, and they were submitted here together on argument, and what is said and decided herein in one of such causes applies as well to the other.

John W. Erickson, the defendant in error, brought two suits in the circuit court of Dade county against the respective 421 plaintiffs in error upon two policies of fire insurance, and recovered judgment in each case, and the said insurance companies bring the cases here for review by writs of error.

Various errors are assigned upon rulings of the court on the pleadings, but as what we shall say as to one of these issues will effectually dispose of the two causes, it becomes unnecessary to notice any of the other assignments of error.

Both of the policies sued upon in the two respective suits contained the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership."

On the 31st of August, 1904, by leave of the court, the defendants in both cases interposed the following plea: "That the alleged contract declared on is a policy of fire insurance made a part of the declaration, and the same as set forth provides that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the interest of the assured be other than unconditional and sole ownership.

And defendant further says that the said policy became and was and is void, in that it was not otherwise provided

by agreement indorsed thereon, or added to said policy, that the interest of the insured in the property insured might be other than unconditional and sole ownership, and yet so it was that the building described in said policy as the subject matter of insurance stood upon, and was in law, a part of the parcel of land hereinafter described, and that at the time of the making of said policy of insurance the interest of the said plaintiff in said building [422] was other than unconditional and sole ownership, in this, that the said plaintiff at the time of the issuing of said policy of insurance, and prior to the making of said policy, had contracted to sell the said property under and in pursuance of his certain written contract under seal, in the words and figures as follows:

"ARTICLES OF AGREEMENT, made this 12th day of March in the year of our Lord, One Thousand, Nine Hundred and Three, between John W. Erickson, of Dade county, Florida, party of the first part, and W. L. Burch, of Warren county, Kentucky, party of the second part.

"WITNESSETH: That if the said party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, that the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all encumbrances whatever by a good and sufficient deed, the lot, piece or parcel of ground situated in the county of Dade, State of Florida, known and described as follows, to-wit: The South one hundred feet of lot Eleven (11), Block one hundred and five (105) of the City of Miami according to a map on file in the office of Clerk of Circuit Court in and for said county made by A. L. Knowlton, C. E.

"And the said party of the second part hereby covenants and agrees to pay to said party of the first part the sum of seven thousand dollars in the manner following: Four hundred dollars cash upon the signing of this contract, six hundred dollars on the first day of May, 1903, and six thousand dollars upon the delivery of the deed October the 1st, 1903. The said party of the first part retaining all the rents until the said October 1st, 1903.

[423] "And in case of the failure of the said party of the second part to make either of the payments or any part thereof, or to perform any of the covenants on his part here-

by made and entered into, this contract shall, at the option of the party of the first part, be forfeited and terminated, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by him sustained, and the said party of the first part shall have the right to re-enter and take possession of the premises aforesaid without being liable to any action therefor.

"IT IS MUTUALLY AGREED, by and between the parties hereto, that the time of payment shall be an essential part of this contract and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

"IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

"JOHN W. ERICKSON. (Seal.)
"W. L. BURCH. (Seal.)

"Signed, sealed and delivered in the presence of:
"CHARLES PARRY.
"JOSEPH W. HOMER.

"State of Florida,
County of Dade.

"Before me, the undersigned authority, on this day personally appeared John W. Erickson, to me well known to be the person described in and who executed the within and foregoing contract and acknowledged to me that he executed the same for the uses, purposes and consideration therein expressed.

424 "In testimony whereof, witness my hand and seal in the City of Miami on this the —— day of March, A. D. 1903.

"MITCHELL D. PRICE,
"Notary Public State of Florida at Large."

And defendant further says that the provisions of said sale had been complied with by the said parties thereto up to and at the time of the making of the said policy, and continuously up to and at the time of the said alleged fire so alleged to have damaged said building, including the payment by said vendee, W. L. Burch, to the plaintiff of said in-

stallments of purchase money, to wit, the aggregate sum of one thousand ($1,000) dollars.

That under and by virtue of the provisions of said written contract hereinbefore set forth, the interest of said insured was not that of unconditional and sole ownership, but his interest in said subject of insurance was conditioned as follows: That he held said property conditional to convey the same in fee simple, clear of all encumbrances, to W. L. Burch of Warren county, Kentucky, upon the payment by the said Burch of the sum of seven thousand dollars ($7,000), as prescribed in said contract, and the said Burch under said contract had the right to compel the said John W. Erickson, the insured, to comply with the terms and conditions of said contract, and to convey to him the said title upon the payment of the purchase price named therein.

That at the time of the happening of said fire the said W. L. Burch had paid to the said plaintiff the sum of one thousand ($1,000) dollars, and had an interest in the said property under his said contract of insurance, to wit, the interest of a purchaser under a conditional contract [425] of purchase with a part of the purchase money, to wit, one thousand ($1,000) dollars paid.

That after the making of said contract hereinbefore set forth, and at the time of the happening of said fire, the said assured held the said property subject in all respects to the terms and conditions of said contract, and his entire interest therein was to receive therefrom the said sum of six thousand ($6,000) dollars remaining unpaid on said purchase money, and but through the consent or voluntary default of the said W. L. Burch the said John W. Erickson had no interest or ownership in said property, except to receive therefrom the sum of six thousand ($6,000) dollars; and held his said interest and ownership subject to the conditions set forth in said contract and to the interest of the said W. L. Burch, acquired by said contract and by the payment of one thousand ($1,000) dollars of purchase money thereunder.

The plaintiff demurred to this plea in both cases upon the grounds: "1. The contract of sale set up in the plea is a personal contract, and created no estate or interest in land; 2. One does not cease to be the unconditional and sole owner of land by agreeing to convey it at a future date, the contractee not being let into possession; 3. The insurable interest of Erickson remained the same as before the contract, because

the loss of the building would prevent delivery of the property contracted to be sold, and occasion a claim by the contractee for a reduction of the agreed price by the amount of the loss." The court below sustained this demurrer and this ruling is assigned as error.

[426] The court below erred in this ruling. That such provisions in policies of fire insurance are material, valid and binding upon the parties is settled by the great weight of authority, and it is so recognized here in Scottish Union etc. Ins. Co. v. Petty, 21 Fla. 399.

In the argument here it was contended for the defendant in error that the contract set up in this plea was nothing more than an option to the contractee Burch, giving him the right to become the purchaser of the property covered by the policies at a future date, and that the execution of such option by Erickson, the assured, effected no change in his interest in the property or ownership thereof, and that consequently such policies of insurance issued to him after the execution of such contract and while it was in full force were not affected thereby.

Our construction of the contract of sale set up in this plea is entirely at variance with this contention. We think that this contract is a skillfully drawn and perfect bond for title, whereby Erickson solemnly and unqualifiedly bound himself, his heirs, executors, administrators and assigns, to convey and assure the property in fee by a good and sufficient deed, clear of all encumbrances, to the vendee Burch, upon the payment by the latter of definitely fixed and agreed sums of money at definitely fixed and agreed dates, and whereby the vendee Burch solemnly and unqualifiedly obligated himself, his heirs, executors, administrators and assigns, to pay such definitely fixed and agreed sums at the dates specified. The instrument is under the seal of the respective parties and formally witnessed by two subscribing witnesses. It imposes upon the respective parties to it an entire mutuality of obligation. The vendee to pay the fixed sums of money at fixed [427] dates, upon compliance with which the vendor is obligated to convey the property by unencumbered title. The only optional feature contained in it is that the vendor Erickson reserves the right, at his option or discretion, of either enforcing the payment by the vendee Burch of the agreed price of land, or of rescinding the contract and retaining as damages for its breach all sums already paid in the event

the vendee Burch should fail to make the payments at the dates fixed. We think it is clear that the contract set up in this plea is one that could be mutually enforced in equity between the parties. The vendor could enforce the payment by the vendee of the price of the land therein definitely agreed to be paid, and, on the other hand, the vendee, upon payment of the agreed purchase price, could enforce conveyance of the legal title to himself. This optional feature of the contract gives to the vendor Erickson the right to revoke and abandon the contract of sale upon the failure of the vendee to comply with his obligations thereunder, but does not give to the vendee Burch the same option or right of abandonment, but unqualifiedly obligates him to buy and pay the agreed purchase price.

The execution and delivery of this contract of sale and conveyance rendered the interest of the vendor Erickson in the land sold no longer that of sole and unconditional ownership within the meaning of the quoted provision of the policies of insurance sued upon, but, on the contrary, in the case of Phenix Ins. Co. of Brooklyn v. Kerr, decided by the circuit court of appeals of the eighth circuit, 129 Fed. 723, cited in the briefs of counsel for the defendant in error, it is held that: "The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted [428] to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs."

Upon the execution and delivery of the contract of sale set up in the defendant's plea the vendor Erickson became the holder of the legal title in trust for his vendee Burch, as security for the deferred purchase price due from the latter to the former, and the vendee Burch held the purchase price as trustee for his vendor: 2 Story's Equity Jurisprudence, 13th ed., sec. 789. We do not think that the retention of possession of the land by the vendor Erickson makes any material difference in his status as owner so as to affect the question under discussion. He had the right to stipulate, as he did do, for the retention of possession until the purchase money was paid, but this did not render the transaction any the less an unqualified sale of the property on his part and purchase thereof by his vendee. This contract of sale and

purchase having been entered into prior to the issuance of the policies of insurance sued upon, and being in full force and effect at the time they were issued, rendered the said policies void according to their express terms, and they cannot be recovered upon: Germond v. Home Ins. Co., 2 Hun, 540; Savage v. Howard Ins. Co., 52 N. Y. 502, 11 Am. Rep. 741; Phoenix Ins. Co. v. Public Parks Am. Co., 63 Ark. 187, 37 S. W. 959; Elliott v. Ashland Mut. Fire Ins. Co., 117 Pa. St. 548, 2 Am. St. Rep. 703, 12 Atl. 676; Gibb v. Philadelphia Fire Ins. Co., 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137; Sisk v. Citizens' Ins. Co. of Evansville, 16 Ind. App. 565, 45 N. E. 804; Wood on Fire Insurance, sec. 194; Matthews v. Capital Fire Ins. Co., 115 Wis. 272, 91 N. W. 675; Loventhal v. Home Ins. Co., [429] 112 Ala. 108, 57 Am. St. Rep. 17, 20 South. 419, 33 L. R. A. 258; Dupreau v. Hibernia Ins. Co., 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; Pennsylvania Fire Ins. Co. v. Hughes, 108 Fed. 497, 47 C. C. A. 459; Abbott v. Shawmut Mut. Fire Ins. Co., 3 Allen, 213; Davis v. Pioneer Furn. Co., 102 Wis. 394, 78 N. W. 596; Millville Mut. Fire Ins. Co. v. Wilgus, 88 Pa. St. 107; Chandler v. Commerce Fire Ins. Co. of New York, 88 Pa. St. 223; Lewis v. New England Fire Ins. Co., 24 Blatchf. 181, 29 Fed. 496; Pelton v. Westchester Fire Ins. Co., 77 N. Y. 605.

The judgment of the court below in both of said causes is reversed, with directions to overrule the demurrers therein of the plaintiff to the additional pleas of the defendants filed August 31, 1904. The costs of these writs of error to be taxed against the defendant in error in both cases.

Hocker and Parkhill, JJ., concur.

Shackleford, C. J., and Whitfield, J., concur in the opinion.

Cockrell, J., disqualified.

A Vendee of Land in Possession, exercising acts of ownership under an executory contract of purchase, and holding the bond of the vendor to make title upon a full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner of the land in fee, within the meaning of these words as used in contracts of fire insurance: Loventhal v. Home Ins. Co., 112 Ala. 108, 57 Am. St. Rep. 17; Baker v. State Ins. Co., 31 Or. 41, 65 Am. St. Rep. 807; Johannes v. Standard Fire Ins. Co., 70 Wis. 196, 5 Am. St. Rep. 159. But see Liverpool etc. Ins. Co. v. Cochran, 77 Miss. 348, 78 Am. St. Rep. 524.

WESTERN UNION TELEGRAPH COMPANY v. WELLS.

[50 Fla. 474, 39 South. 838.]

TELEGRAPH COMPANIES cannot, by Their Negligence, or willfulness, cause suffering in mind and body to an individual, and then claim to be liable only for a return of the consideration received for correct service. (p. 132.)

NEGLIGENCE—Pleading.—Demurrer is not the proper remedy for getting rid of improper items of special acts of alleged negligence, where the declaration makes a case entitling the plaintiff to any recovery whatever, even though it is only nominal damages. (p. 132.)

TELEGRAPH COMPANIES—Negligence—Complaint—Sufficiency.—A complaint alleging the willful refusal of a telegraph company to pay money in its hands to which plaintiff was entitled, with full knowledge that he would thereby be compelled to travel without food for more than twenty-four hours, states a good cause of action, and a bona fide claim, within the jurisdiction of the court, though the money withheld is below the jurisdictional amount. (p. 133.)

TELEGRAPH COMPANIES—Negligence.—After suit brought against a telegraph company for refusal to pay over to the payee of a telegraphic order the money named therein, the company is not excused from liability for its negligence by paying the money over to the transmitting bank. (p. 133.)

TELEGRAPH COMPANIES—Negligence—Damages for Physical Pain and Mental Suffering.—If the result of the willful refusal, without adequate cause, of a telegraph company, to pay money to one entitled thereto on a telegraphic order causes him to travel for more than thirty-six hours without food or funds, he is entitled to recover for bodily pain and suffering, and for mental pain and anguish attendant thereon. (p. 135.)

EVIDENCE Offered in Support of an element of damage alleged, and allowed over general objection, is not error if it is legally pertinent or relevant in any aspect of the case. (p. 136.)

TELEGRAPH COMPANIES—Statements of Agent—Hearsay Evidence.—The statement of a receiving clerk and cashier in the main office of a telegraph company concerning matters within the apparent scope of his authority is not hearsay evidence. (p. 136.)

J. E. Hartridge & Son, for the plaintiff in error.

R. L. Anderson, for the defendant in error.

475 COCKRELL, J. - The original declaration in this cause was as follows: "G. Wakefield Wells, by his attorneys, R. L. Anderson and William Hocker, sues the Western Union Telegraph Company, a corporation, organized and existing under the laws of the state of New York, for that the defendant was on the twenty-sixth day of September, 1901, operating certain lines of telegraph wires extending from the city of Ocala, Florida, to the city of Philadelphia, Pennsylvania, and had then and there employed divers agents at said cities

and at other intermediate points for the purpose of transmitting by telegraph messages and credits for the general public from the said city of Ocala to the said city of Philadelphia at and for certain rates, or tolls, in that behalf charged by the defendant, and for the purposes aforesaid then and there had and maintained a certain office in the said city of Ocala and a certain office in the city of Philadelphia, wherein the defendant had then and there employed divers agents to transmit and receive such messages [476] and to transmit and receive and pay over such credits and to serve the public speedily and correctly in that behalf.

And the plaintiff avers that on the day and year aforesaid, and while the defendant was conducting the business as aforesaid, and while the plaintiff was in the said city of Philadelphia, a certain firm of bankers doing business under the name of Munroe & Chambliss, in the said city of Ocala, and acting as the agents of the plaintiff in this behalf, deposited a certain sum of money, to wit, twenty-six dollars and eighty-five cents, with the agent of the defendant in charge of its said office in said city of Ocala, and the defendant then and there, in consideration thereof, undertook and agreed to speedily and correctly transmit by telegraph a message to the agents of the defendant so employed in its said office in the said city of Philadelphia, opening a credit for immediate payment to the plaintiff, under the name of G. Wake. Wells, with such last-named agents of the defendant, so employed in said last-named city, to the extent of twenty-five dollars, the remainder of said sum of twenty-six dollars and eighty-five cents, to wit, one dollar and eighty-five cents, being the sum charged by the defendant for so undertaking to speedily and correctly open said credit and pay over to the plaintiff, under the name of G. Wake. Wells, the said sum of twenty-five dollars; yet the defendant, disregarding its undertaking aforesaid and in violation of its agreement aforesaid, failed to correctly transmit said credit and open the same for payment to the plaintiff, under the name of G. Wake. Wells, with the said agents of the defendant in the said office in the said city of Philadelphia, in the manner and form as agreed by the defendant; and the agent of the defendant in charge of said office in said last-named city then and there, after receipt by it of said twenty-six dollars and eighty-five cents, and after a sufficient time had elapsed to permit it [477] to open such credit with such agents, wrongfully and willfully, upon the plain-

tiff's demand, refused to pay to the plaintiff the said sum of twenty-five dollars, whereby the plaintiff and his family suffered great pain and anguish of mind and body and were greatly wronged and injured, and the plaintiff claims nineteen hundred and fifty dollars

Upon the order and leave of court this was amended by substituting for the last four lines the following: "And the plaintiff was and is thereby greatly injured and damaged in this, to wit, that the said Munroe & Chambliss on the day aforesaid, and prior to said refusal of said defendant to pay said sum to plaintiff, had paid to and deposited with the defendant, to be by it delivered to the plaintiff, the said sum of twenty-five dollars; that the plaintiff with his wife and two infant children was on said day in said city of Philadelphia in the state of Pennsylvania, traveling from said place to Ocala, Florida, a distance of one thousand miles or more, and that the plaintiff and his wife and children were wholly without money and funds, and wholly without the means of obtaining money or funds, except through the payment by defendant to plaintiff of said sum of twenty-five dollars; that it was necessary that plaintiff should receive said sum of money in order to buy and provide the means of living and purchasing food for himself and his family during said journey to Ocala, Florida; that the defendant was by the plaintiff then and there informed of and well knew all the facts hereinabove pleaded, and having such knowledge the defendant willfully, and without excuse, refused to pay the said sum of money or any part thereof to plaintiff; that the plaintiff and his wife and children were thereby compelled to and did travel from Philadelphia, in the state of Pennsylvania, to Jacksonville, in the state of Florida, without food and without the means or ability to purchase or provide [478] food, for a period of thirty-six hours and more, and were thereby made and become sick and ill, and were compelled to and did suffer great bodily pain and illness, and great mental pain and anguish. Plaintiff claims damages in the sum of nineteen hundred and fifty dollars."

The defendant demurred to the declaration as amended upon the grounds: "1. The damages claimed by the plaintiff do not fairly arise, according to the usual course of things, from the breach of contract complained of, and are not such damages as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract,

as a probable result of a breach of it; 2. There is no privity between the plaintiff and the defendant; 3. The damages claimed are not such as ensue from the alleged breach of contract by defendant, and the suffering alleged was brought about by the action of the plaintiff himself and not otherwise; 4. There is no venue laid."

Upon the overruling of this demurrer the defendant pleaded, first, not guilty; second, "that Messrs. Munroe & Chambliss, described as bankers and as the agents of the plaintiff in Ocala, Florida, received back and accepted from the defendant all of the moneys paid by them for the account of the plaintiff, to wit, twenty-six dollars and eighty-five cents, since the commencement of this suit, wherefore and by reason whereof all rights of action of the plaintiff became lost and extinguished"; and, third, "that all of the injuries and damages complained of as happening to said plaintiff were caused by the voluntary act of the plaintiff and not otherwise." The second plea was held bad on demurrer.

[479] There was verdict for the plaintiff in the sum of one thousand dollars, upon which judgment was entered, and the defendant sued out this writ of error.

The first error assigned is the overruling defendant's demurrer to plaintiff's declaration as amended. The argument here is upon the theory that the declaration discloses an actual claim for less than one hundred dollars, and that therefore it is below the jurisdiction of the circuit court, in which court the action was brought. It can hardly be claimed that the stated grounds of the demurrer fairly raise the question of jurisdiction, but as it was raised on the demurrer to the original declaration and was probably argued on this subsequent demurrer, we may dispose of it.

The declaration is in tort for the willful act of the company whereby the plaintiff suffered in body and mind, and the claim asserted in good faith was far in excess of the minimum amount required for the jurisdiction of the circuit court. This court is not committed to the doctrine that a public service corporation can, by its negligence or willfulness, cause suffering in body and mind to an individual and then be heard to say it is liable only to a return of the consideration received by it for correct service.

A demurrer is not the proper remedy for getting rid of improper items of special acts of alleged negligence where the declaration makes a case entitling the plaintiff to any

recovery whatever, even though it be only nominal damages: Borden v. Western Union Tel. Co., 32 Fla. 394, 13 [480] South. 876; Cline v. Tampa Waterworks Co., 46 Fla. 459, 35 South. 8, and cases cited. The circumstances under which the plaintiff was contending; his presence without money and without friends in a large city one thousand miles from his home, with a wife and two small children, and no resources from which he could supply himself or them with food or other necessities on the journey, other than the twenty-five dollars which the telegraph company owed him—these circumstances, it is alleged, were all known to the defendant company; the willful refusal, without adequate excuse, of the company to pay over to him that sum entitled him undoubtedly to a substantial recovery for the resultant injury to him thereby directly occasioned, in the mortification, inconvenience, physical and mental suffering incident to traveling a great distance without food or other necessities for himself and for those to whom he owed the highest natural obligations. There is nothing in the allegations of the declaration to justify an argument that these sufferings were self-imposed, and the ground of the demurrer based thereon must find its suggestion from something outside the declaration.

What we have said answers all the contentions made here in support of this demurrer, and the assignment is not sustained.

The second plea filed by the defendant was insufficient in many respects. The fact that Munroe & Chambliss, as the plaintiff's bankers, had at his request deposited money with the telegraph company to be transmitted to him, does not make them his agent to such an extent that after suit brought for the negligence of the company a payment by it to them of the whole amount by them advanced, but not all received, by the company in the plaintiff's behalf [481] could by such act defeat plaintiff's right of action. Other objections to the plea will readily occur.

The court charged the jury that if they found for the plaintiff they might allow damages for bodily pain and suffering, and in addition thereto damages for mental pain and anguish, which the plaintiff himself suffered, but could not consider as an element of damages any physical pain or mental suffering on the part of his family. The plaintiff in error complains of this charge, the burden of the plaint being that nothing can be recovered under this declaration except the

sum paid by the plaintiff to the telegraph company, a position heretofore held untenable. Reliance is, however, had upon International Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810. There we held that where the failure of a telegraph company to send or deliver promptly a telegram according to its contract results in no other damages than mental pain and suffering, only nominal damages could be recovered in an action sounding in tort, but for compensative damages for a breach of the contract. This action was not based upon the failure of the telegraph company in promptness, but upon its willful refusal to pay over money tc the plaintiff under the following circumstances: The plaintiff, G. Wakefield Wells, with his wife and two small children, arrived in Philadelphia, September 26, 1901, en route from Buffalo, New York, to Ocala, Florida. Being short of funds, he sent a telegram about 11 A. M. through defendant company to his Ocala bankers, saying: "Wire me at once twenty-five dollars waive identification." Being advised that the reply would be received in two or three hours, he expended all his money except one dollar and ten cents in securing a section in the sleeping-car to Jacksonville, Florida. His bankers promptly honored his demand and delivered to the telegraph [482] company in Ocala the requested sum and the toll, with directions to waive identification. By a mistake of the telegraph company the return message ordered the payment made to "G. Wake. Fells" instead of to "G. Wake. Wells." This telegram was not received in Philadelphia until after 5 o'clock and within a short time of the leaving of the plaintiff's train. The agent in Philadelphia expressed himself satisfied with the plaintiff's identity and that the mistake occurred in the transmission, but declared his inability to pay the money over until the mistake should be corrected, which would take several hours. The plaintiff made known fully his circumstances, the long journey he would be required to take without food, and the other incidents to lack of funds when traveling with a wife and children; that the departure of his train was imminent, and that he could not wait the time necessary for the correction. With all these facts and circumstances fully made known to the defendant company, it yet willfully refused to pay over the money, and must be held to the consequences.

The intimate association between mind and body is a matter for discussion among the psycho-physiologists, but to the

laymen it is clear that a tribunal that allows damages for physical suffering cannot deny damages for the mental suffering attendant upon the physical; the one is as much an actuality as the other, and just as readily determinable by a jury.

There was evidence under the declaration calling for substantial damages, and the affirmative instruction requested by the defendant was properly refused. It was left to the jury to say whether the injury to the plaintiff was self-imposed, and by their verdict it was found that it was not. Practically nothing was in evidence to justify [483] the charge —certainly nothing that would justify this court in setting aside the jury's finding. The refusal of the company to pay over the money compelled the plaintiff to act quickly. He was not aware that he could receive within a few minutes from the sleeping-car people the money he had paid for the section to Jacksonville, nor is there proof of that fact, and it is assuredly not within the judicial knowledge of the court, and with the alternative of remaining over night in a large city without funds for either lodging or meals, and without assurance of being able at any time of getting his money from the telegraph company, he chose to take at least the assurance of a roof over his head and a return toward his home, where there was a greater possibility of his finding relief.

Many exceptions were reserved to the admission of testimony, but we need not set them out seriatim. It suffices to say that many of these exceptions taken were to the materiality of evidence tending to support the allegations of the declaration as to the plaintiff and his family being compelled to travel from Philadelphia to Jacksonville without food, and without the means to purchase or provide food, for a period of thirty-six hours and more, whereby they became sick and suffered great bodily and mental pain.

No motion was made to strike from the declaration the allegations as to the suffering of the wife and children, and the court instructed the jury not to consider as an element of damages any physical pain or mental suffering to the wife and children of the plaintiff. Was harmful error committed, then, in admitting testimony that the wife and children suffered for food? But one of the three methods for discarding improper elements of damages was adopted. The defendant failed to move to strike [484] them from the declaration, nor did it request instructions eliminating the evidence in support

thereof, further than was done by the court's charge; and we are confined to the objections to admissibility, based upon relevancy and materiality; for if the evidence was relevant and material, the further quality of influence or prejudice upon the jury may, indeed should, follow.

It is questionable whether the errors assigned upon the admission of this evidence have been argued so as to demand a decision by us; the point is stated in the brief of the plaintiff in error, and the case of Florida Southern Ry. Co. v. Katz, 23 Fla. 139, 1 South. 473, is cited presumably in support thereof, but the citation has no possible relevancy. Waiving, however, the adequacy of the presentation of the assignments, but applying our well-recognized rule as to general objections to the admissibility of testimony, we look to ascertain if the evidence may be legally pertinent or relevant in any aspect of the case.

The conditions fully disclosed to the telegraph company at the time of the tortious act and sufficiency alleged in the declaration showed that the probable direct result of its action would be to cause this man with his wife and small children to travel for more than twenty-four hours with but a little more than one dollar. The public exhibition of his inability to provide the necessities of life for his family tended to add to his own humiliation and mortification, and their condition, as brought out by this testimony, would forbid to any being, however low his moral standard, the application of the one dollar in his possession to the relief of his own individual wants, to the exclusion of the weaker dependents.

The conversations between the plaintiff and the agents of the company in Philadelphia were not hearsay. The [485] plaintiff testified he went first into a branch office of the company, where he was directed to the main office, and there he held conversation with the receiving clerk and also the cashier. In the absence of countervailing proof this sufficiently established the agency of these employés.

With the amount of damages we have nothing to do. No attack was made upon the verdict as excessive. A verdict for the plaintiff was fully warranted, and as no errors of law have been made to appear to us, the judgment is affirmed.

Shackleford, C. J., and Whitfield, J., concur.

Taylor and Parkhill, JJ., concur in the opinion.

Hocker, J., took no part in the consideration of this case.

A Telegraph Company negligently failing to deliver a message from a person in a strange city and a long distance from home, asking for money, and because of such negligence compelled to make the journey home on foot, is liable to him in damages for the price of the telegram, wages or compensation for time lost in reaching his home, price of meals and lodging while he is en route, and for mental worry and distress accompanying his physical fatigue and suffering while making the journey: Barnes v. Western Union Tel. Co., 27 Nev. 438, 103 Am. St. Rep. 776. The better doctrine is, that a telegraph company is liable in damages for mental suffering due to a negligent failure to deliver a telegram, whether such mental suffering is accompanied by physical suffering or injury or not: Barnes v. Western Union Tel. Co., 27 Nev. 438, 103 Am. St. Rep. 776; Willis v. Western Union Tel. Co., 69 S. C. 531, 104 Am. St. Rep. 828.

HERNANDEZ v. THOMAS.

[50 Fla. 522, 39 South. 641.]

PARENT AND CHILD—Custody of Children.—The father alone has power to appoint a testamentary guardian for his child by last will and testament, or by deed. No such power is conferred upon the mother from any source. (p. 145.)

PARENT AND CHILD—Contracts for Custody of Children.—Contracts by parents for the transfer to others of the custody of their children are against public policy, and generally are not enforceable or binding. (p. 145.)

PARENT AND CHILD—Custody of Children.—While in awarding the custody of children, the paramount consideration is their welfare, rather than the technical legal right of the parent, yet the courts should not lightly and without good cause invade the natural right of the parent to the custody, control, and care of his infant child. (p. 146.)

PARENT AND CHILD—Religious Training.—The father of infant children, when there is no sufficient cause for depriving him of the right, has the legal right to their custody and control and the right to have them educated in any religious faith that he sees proper whose tenents do not inculcate violation of the laws of the land. (p. 146.)

PARENT AND CHILD—Father Entitled to Custody of Children.—As against strangers, the father, however poor and humble, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. In such case it is not enough to consider the interests of the child alone. (p. 147.)

PARENT AND CHILD—Custody of Children.—As between father and mother, or other near relative of the child, where sympathies of the tenderest nature may be confidentially relied upon, the father is generally preferred as the custodian of his child. (p. 147.)

A. St. Clair Abrams, for the appellants.

J. L. Doggett, for the appellee.

[523] TAYLOR, J. On April 21, 1902, the appellant, Eugene C. Hernandez, filed his bill for divorce against his wife, Madge G. Hernandez, upon the statutory ground of willful, obstinate [524] and continuous desertion for more than a year. The bill, after alleging the desertion by the wife, also alleged that the parties had two children, named Blanche and Edith, the one seven years of age, the other five years old, and the complainant voluntarily offered and consented in said bill that the custody of said two children should go to the mother until they arrived at the age of fifteen years, when the said children were to have the right to select which parent they desired to live with, the father in the meantime to have the right to visit and see them at all reasonable times. The wife answered the bill admitting the desertion of her husband as alleged, but sought in the answer to justify such desertion on the ground of alleged failure of the husband to provide for her and her two children, and upon the ground of unkind treatment by the husband. At the hearing before the master the complainant proved all of the allegations of his bill, but the defendant wife failed to introduce any evidence whatever to sustain her answer. On the twenty-fifth day of June, 1902, the circuit judge in and for Duval county rendered a decree divorcing the said parties a vinculo matrimonii, and, in consonance with the voluntary offer in the complainant's bill, adjudged the custody of the said two minor children to their mother, Madge G. Hernandez, until they each arrived respectively at the age of fifteen years, or until the further order of the court, when it was adjudged said children should have the right to select which parent they should live with.

On June 1, 1903, Eugene C. Hernandez filed his petition in the circuit court of Duval county in which he set forth the above-mentioned decree of divorce, and alleged that his said divorced wife, Madge G. Hernandez, had died during the month of September, 1902, and that upon her [525] death he had taken the custody and control of his said two minor children, Blanche and Edith, then aged, respectively, eight and six years. Said petition further alleged that while said children were under the care and control of his wife they were permitted to go at large and to spend a large part of their time on the streets, and that since their mother's death, although he had endeavored to keep them at home, they were inclined to be wild and to leave home and go off and be upon the streets; that he was unable to give them that care and at-

tention necessary for their benefit, and deemed it desirable that they should be put in such custody and care as will enable them to be properly educated and reared; that it was his desire that his said children should be reared and educated in the faith of the Roman Catholic church, and that he desired that said children should be placed in the custody and control of St. Mary's Orphan Home in the city of Jacksonville, Florida, to be there cared for and educated, and that he could and would pay the sum of five dollars per month for the care and maintenance of said children; that said orphan's home had expressed its willingness to take said children and educate and provide for them until they arrived at the age of eighteen years. Said petition prayed that said St. Mary's Orphan Home might be awarded the care and custody of said minor children until they had arrived at the age of eighteen years.

On June 1, 1903, the circuit judge of Duval county made an order upon such petition granting the prayer thereof, and reciting the fact that it appeared to the court that it was for the best interests of said minors that they should be placed in the custody and control of said St. Mary's Orphan Home, and decreed and ordered that said two minors should be placed in the custody and control of said home until each of them shall have arrived at the [526] age of eighteen years, or until the further order of the court. And it was further ordered and decreed that the petitioner, Eugene C. Hernandez, should pay to the said orphan's home the sum of five dollars per month for the care, maintenance and support of said children.

On October 15, 1903, the appellee, Sarah Ann Thomas, filed an application to be permitted to intervene in the said divorce suit formerly pending between Eugene C. Hernandez and Madge G. Hernandez, by petition presented with the application for such intervention. Said petition after setting forth the decree of divorce granted to Eugene C. Hernandez from his wife, Madge G. Hernandez, and its provisions as to the custody of said two minor children, alleged that the said Madge did continue to care for said two children and to rear them in a proper manner until the sixteenth day of September, 1902, when she died; that just before her death she did make and execute a last will and testament, whereby she gave and bequeathed the custody of the said children to petitioner, Mrs. S. A.

Thomas, who was her mother, and Mrs. A. M. DeLucca, who was her sister; that soon after the death of said Madge the said Eugene called at the home of her, the said petitioner, where the said Madge had lived for about two years preceding her death, and demanded possession of said children, and that she, being advised by her neighbors that he had a right to take them as matter of law, permitted him to take them from her possession, but not until she had exacted a promise and agreement from the said Eugene that whenever he found that he could not support the children as well as they had been supported by petitioner that they should be returned to her; that since that time she had learned while she was absent from the city of Jacksonville that said children were being allowed to run at large without any care or attention [527] being given them, and that as soon as it was possible for her to do so she returned to Jacksonville for the purpose of getting possession of the said children; that in the meantime, however, the said Eugene C. Hernandez did file a petition in the circuit court of Duval county to have said children given to the care and custody of St. Mary's Orphan Home in the city of Jacksonville, all of which was done without notice to her, and which petition had been granted by the court, and that said two children were being held by said St. Mary's Orphan Home against the consent of both of said children, whose wish it is to live with petitioner, who is their grandmother; that she, petitioner, was amply able financially, and is a proper and fit person in all respects, to care for, maintain, rear, educate and protect the said children, and that she is now entitled to the possession and custody of said children, and that it is to the best interests of the said children that petitioner have the care and custody of them. The petition prayed that the order and decree of the court made June 1, 1903, consigning the custody and care of said children to St. Mary's Orphan Home be vacated and set aside, and that she be decreed to have the care, custody and control of said children until they each arrived at the age of eighteen years. A copy of the purported will of said Madge G. Hernandez bequeathing the possession and custody of said children to Sarah Ann Thomas, the petitioner, and to their aunt, Mrs. A. M. DeLucca, was attached as an exhibit to said petition.

Eugene C. Hernandez and the representative of St. Mary's Orphan Home filed divers objections to the petitioner being

allowed to intervene by petition in the divorce suit aforesaid, which objections it is unnecessary to state further.

[528] The court below overruled all of these objections and permitted the petition to be filed, and required the defendants, Eugene C. Hernandez and St. Mary's Orphan Home, to answer or defend by a fixed day. Eugene C. Hernandez demurred to the petition upon divers grounds not necessary to be noticed further. This demurrer was overruled by the court.

Sister Mary Ann, on behalf of St. Mary's Orphan Home, answered the petition, alleging that the said two minor children had been consigned to the custody and care of said orphan home not only by the order and decree of the circuit court for Duval county, but also by a deed in writing voluntarily executed by Eugene C. Hernandez, the father of said children; that St. Mary's Orphan Home is not an incorporated institution, but is a private institution for the education, rearing and maintenance of orphan children in the Roman Catholic faith and is confined to children who are entirely orphaned, or whose parents desire them educated and reared in the Roman Catholic faith, and who are willing to pay for the care, maintenance and education of their children in accordance with their means; that when said children first came to said home they had acquired the habit of using improper and indecent language, and that the Sisters in charge of said home had found it necessary to take them aside and speak to them, and by teaching and admonition eradicate from their minds the improper language and thoughts they had acquired before coming there; that since they had been there they have been carefully and tenderly cared for and nurtured; that they have ceased to speak improper language, have been well fed, have been given daily secular as well as religious instruction, have been kept clean and tidy, have not been permitted to run at large in the street, but have been kept within the inclosure [529] of the home, except when accompanied by one or more of the Sisters in charge of the home, have been given ample exercise, and that everything possible to be done has been done and is being done to promote their physical, mental and moral welfare, and that said children have been and are in good health, well contented and happy; and that their father has faithfully paid to said home the sum of money he agreed to pay for their care; that said children express themselves contented to remain at said

home, but that they are of such tender age as to be incapable of deciding for themselves what is to their best interests; that said children are taught to entertain a proper love and regard for their relatives, which relatives, including the petitioner, are permitted to and do visit them there, and that the said home does not seek to alienate their affection from their relatives; that said children are surrounded at said home by educational and moral influences that conduce directly to their moral and mental welfare, and that it is for the best interests of said children that they should remain at said home. It was further averred in the answer that the petitioner had no right at law or in equity to intervene in behalf of said children, and that no facts were set forth in the petition which entitle her to the custody of said children, and the same benefit is claimed therefrom as though the respondent had demurred to such petition.

Eugene C. Hernandez also answered the petition separately. He alleges in his answer that while his divorced wife, Madge G. Hernandez, had the nominal care and custody of said two children, that they were in the actual custody of the petitioner, Sarah Ann Thomas, for the greater part of the time after the granting of the divorce; that shortly after the decree of divorce was rendered the [530] said Madge G. went to the city of Tampa, where she remained until a short while before her death, and that during her absence the said children were left in Jacksonville with their grandmother, the petitioner, who bestowed so little care and attention upon them that they were habitually permitted to run at large upon the streets of Jacksonville; that the petitioner during such time resided in a disreputable neighborhood, where her premises abutted the premises of a notorious house of ill-fame occupied by prostitutes, and that said children were permitted to run at large on the premises occupied by said prostitutes. He denies that said children were reared and cared for in a proper manner while in the custody of their mother, but alleges that they were not reared and cared for in a proper manner during such time; that they were not sent to school, but were permitted to run at large, dirty, with soiled clothes on, unkept and uncared for, on the streets of Jacksonville in a locality where numerous women of ill-fame resided; that he, the said Eugene C., had married again, and by his second wife had one infant child, and that by reason of her feeble health and with her infant child to care for she found it impossible to keep the said two minor children

in the house and off of the streets, or to restrain them from the vicious habits they had contracted during the nearly two years while they were in the nominal care and custody of their mother and grandmother, without chastising said children, which she refused to do, because she did not wish to subject herself to the criticism of ill-treating them as their stepmother; that a large part of her time was occupied in hunting them up and bringing them back to the house, and that although he had repeatedly counseled and advised them, he found that they had been so spoiled, and allowed to have their own way prior to their mother's death, while [531] in the custody of their said mother and grandmother, that they required constant watching, and that he became convinced that it was necessary for their moral welfare and to their proper rearing and education that he should place them where they would be properly educated and their moral and religious training attended to as he desired, and placed them for those reasons at said St. Mary's Orphan Home, where he could and does have easy and frequent access to them, and where they would be given proper religious training in the Roman Catholic church, of which he himself is a member; that he pays an agreed sum of five dollars per month for their care and support at said home. Said answer further denies that the petitioner is a fit and proper person to care for, rear and educate said children; that she has the reputation of being a fortune-teller, and of being the vender of medicines to women to procure miscarriages and abortions; that said children are well cared for at said home in every respect; that they are being properly educated, and their moral and religious training are looked after in accordance with his wishes; that they are there given secular and religious training every day in the week; that they attend church regularly, are kept from immoral and contaminating associates and influences; that they are happy and contented at said home; that he is paying for their maintenance regularly, and that they are living in a manner and style far superior, morally, socially and religiously, to any influences that the petitioner can surround them with.

Replication was filed to these answers, a master was appointed to take testimony, and a voluminous mass of testimony was taken and reported to the court. At the final hearing upon the petition, answers and testimony, the circuit judge made a final order or decree vacating its [532] former decree

made on June 1, 1903, conferring the custody of said two minors to the St. Mary's Orphan Home, and bestowing such custody upon the petitioner, Sarah Ann Thomas, until such children arrive at the age of discretion, or until the further order of the court, and requiring said St. Mary's Orphan Home to forthwith deliver said children over to the said Sarah Ann Thomas. From this decree the said Eugene C. Hernandez and St. Mary's Orphan Home have taken their appeal to this court at the present pending term, and assign, among other errors, the following: That the court below erred in permitting the filing of the petition of Sarah Ann Thomas in intervention in the former divorce suit between Eugene C. Hernandez and Madge G. Hernandez; 2. In overruling the demurrer of the respondent, Eugene C. Hernandez, to said petition; 3. That the court erred in awarding the custody of said two children to the petitioner, Sarah Ann Thomas; 4. That the court was without authority of law to deprive a father of his minor children, and from deciding and determining in whose care and custody such children should be placed, in the absence of any allegation or proof that they were placed in the care and custody of improper persons.

The court below erred in its order or decree vacating and setting aside its former order or decree made on June 1, 1903, consigning said two minor children, Blanche and Edith Hernandez, to the custody and care of St. Mary's Orphan Home, and turning them over to the custody and control of the [533] appellee, Sarah Ann Thomas. While we doubt the propriety of the proceeding followed here, that of permitting a stranger to the proceedings to intervene by petition in a formerly pending divorce suit that had long prior thereto passed to a final decree of divorce between the parties, husband and wife, and in which the divorced wife had died subsequent to the decree of divorce, but prior to such intervention by petition, yet inasmuch as it is one of those unfortunate contests over the custody of children where considerable rancor is manifest, we deemed it best, under all the circumstances of the case, to pass over the technicalities of procedure and to dispose of the case upon its merits. Practically the only grounds upon which the petitioner, Sarah Ann Thomas, bases her alleged claim and right to the custody of these two infants, aside from the fact that she is their maternal grandmother, are the alleged will made by the mother of said in-

fants bequeathing them to the custody of their said grandmother and to their aunt, and that prior to his consignment of them to the care and custody of St. Mary's Orphan Home their father, Eugene C. Hernandez, had promised or agreed to give them to her, the said Sarah Ann Thomas, whenever he found that he was unable to care for them equally as well as she, their said grandmother, had formerly cared for them; and that prior to their consignment to said orphan home their father had neglected them and permitted them to run at large upon the streets in a filthy and ragged condition, where they contracted vicious habits and speech.

In so far as the alleged will of the mother, Madge G. Hernandez, is concerned, undertaking to bequeath or devise the care and custody of said children to their grandmother and aunt, such will was a nullity and conferred no claim or right upon said grandmother and aunt to the [534] custody of said children. Our statute, section 2086 of the Revised Statutes, like its predecessor in England, 12 Charles II, chapter 24, section 8, confers upon the father alone the power to appoint a testamentary guardian for his child by last will and testament or by deed. No such power is conferred upon the mother by our statute, and she has no such authority or right from the common law or from any other source: Ex parte Bell, 2 Tenn. Ch. 327; Ingalls v. Campbell, 18 Or. 461, 24 Pac. 904; Ex parte Edwards, 3 Atk. 519.

As to the alleged promise or agreement by Eugene C. Hernandez, the father, to transfer the custody of said children to their grandmother in the event he found himself unable to care for them as well as she had done, such agreements are against public policy, and are not, in cases circumstanced like the one under discussion, enforceable or binding upon the parties: Regina v. Smith, 16 Eng. L. & Eq. 221; Schouler on Domestic Relations, 5th ed., sec. 251, and authorities there cited. But even if this were not true, there has been no such exhibition of want of ability on the part of Eugene C. Hernandez, the father, to have his said two children properly cared for as would justify an enforcement of any such promise or agreement on his part. On the contrary, it is shown by the uncontradicted proofs in the case that he had and has the ability to procure their admission to and maintenance in a permanent home where they have every educational advantage, secular, moral and religious, where they

are well clothed and fed, and are surrounded in their daily lives by all of those refining Christian influences that tend to make of them virtuous, law-abiding and useful citizens.

As to the charge that the father, Eugene C. Hernandez, had neglected said children and allowed them to run wild [535] about the streets in a ragged, unkept condition, where they had contracted vicious habits and speech, the evidence is conflicting, and about evenly balanced as to whether such a condition of affairs did not exist with said children prior to their father's taking charge of them while they were in the custody of their mother and grandmother, and whether the same condition of neglect did not continue after their father took charge of them; but however this may be, the undisputed proof shows that their father had voluntarily put a stop to such condition of neglect, if it existed on his part, prior to the institution of this proceeding, by voluntarily placing them in the care of the Sisters in charge of the St. Mary's Orphan Home, where he and their other relatives have free access to them at all times, and where their every necessary want is properly supplied, and where their every welfare—educational, physical, moral and religious—is carefully and constantly looked after, and where they have been weaned from the vicious habit of roaming the streets.

We have held in Miller v. Miller, 38 Fla. 227, 56 Am. St. Rep. 166, 20 South. 989, in accordance with the prevailing rule in the American courts, that in awarding the custody of children the paramount consideration is the welfare of the child, rather than the technical legal right of the parent. While this is true, yet the court should not lightly and without good cause invade the natural right of the parent to the custody, care and control of his infant child. No sufficient cause has been shown here for depriving this father of the right to the custody and control of these children and of the right to dispose of them for their welfare as he has done. It is not alleged or proved that he is a man of vicious or immoral character, or in any way unfit to have the custody and control of said children. This being [536] true, he, as their father, has the legal right to their custody and control, and to have them educated in any religious faith that he sees proper, whose tenets do not inculcate violation of the laws of the land: Villareal v. Mellish, 2 Swan 533; In re Turner, 19 N. J. Eq. 433. Or, as it is properly expressed in Verser v. Ford, 37 Ark. 27: "As

against strangers, the father, however poor and humble, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone. And as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred." The grandmother here, Sarah Ann Thomas, has shown no valid claim or right to the custody or control of these two children, and if for no other reason, the evil influences to which they would inevitably be subjected in the disreputable locality in which the proofs undisputedly show her to have continuously maintained her residence renders it improper that she should have such care and custody.

The decree of the court below is reversed, with directions to have said two children returned to the custody and care of St. Mary's Orphan Home under the provisions of the decree heretofore made on June 1, 1903, and that the petition of the appellee, Sarah Ann Thomas, herein be dismissed; the appellee, Sarah Ann Thomas, to be taxed with the costs of this appeal.

Hocker and Parkhill, JJ., concur.

Shackleford, C. J., and Cockrell and Whitfield, JJ., concur in the opinion.

In Determining Who shall be Given the Custody of an infant, the court will have regard for the child's welfare: Miller v. Miller, 38 Fla. 227, 56 Am. St. Rep. 166; Jones v. Darnall, 103 Ind. 569, 53 Am. St. Rep. 545; Hussey v. Whiting, 145 Ind. 580, 57 Am. St. Rep. 220; note to State v. Smith, 20 Am. Dec. 333; and also for the child's wishes, when it has reached the age of intelligent discretion: Neville v. Reed, 134 Ala. 317, 92 Am. St. Rep. 35; Marshall v. Reams, 32 Fla. 499, 37 Am. St. Rep. 118; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843. But see the qualification put on this doctrine in Stapleton v. Poynter, 111 Ky. 264, 98 Am. St. Rep. 411. A court cannot deprive a parent of the possession of a child, unless it is shown affirmatively that he or she is unfit to have its custody, or has in some way forfeited the right thereto: Norval v. Zinmaster, 57 Neb. 158, 73 Am. St. Rep. 500. And a strong case must be made out to justify placing a child with a third person as against the demand of a parent: Lovell v. House of Good Shepherd, 9 Wash. 419, 43 Am. St. Rep. 839. A widow of moral habits, good health, and enough industry reasonably to insure her child from want and distress, is entitled to his custody as against his grandparents, although they possess fortune, character, kindness and affection for the child, and he desires to remain with them: Sta-

pleton v. Poynter, 111 Ky. 264, 98 Am. St. Rep. 411. See, also, Power v. Power, 66 N. J. Eq. 320, 105 Am. St. Rep. 653. As to the relative rights of the father and mother of a child to its custody or control, see Rowe v. Rugg, 117 Iowa, 606, 94 Am. St. Rep. 318; Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17; Miller v. Miller, 38 Fla. 227, 56 Am. St. Rep. 166. Contracts for the transfer of parental custody and responsibility are discussed in the monographic note to Fletcher v. Hickman, 88 Am. St. Rep. 866-875.

CASES

IN THE

APPELLATE COURT

OF

INDIANA.

GREEN v. McGREW.

[35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832.]

TAX SALES—Description.—Though a statute provides that a tax deed shall be prima facie evidence of the regularity of the sale of the premises described, and of the regularity of all prior proceedings, and of good and valid title in the grantee, such deed cannot establish title in him, if in the sale or conveyance the description was so imperfect that it failed to describe the land sold with reasonable certainty. (p. 154.)

TAX SALE—Description, Insufficient, not Made Valid by Long Use.—If the description in all the papers, books and advertisements of the taxing officers prior to the execution of a deed are radically insufficient, the mere fact that those officers so employed the description for a number of years does not cure it of its inadequacy for the purpose of the tax deed. (pp. 154, 155.)

TAX DEEDS, Descriptions in, Differences Between and Deeds Between Private Persons.—In the matter of the description of real estate there is, between conveyances executed by owners and tax deeds made by officers, an important difference. Faulty description in the conveyance of an owner may serve because of the intention of the parties relating to the particular estate so conveyed, but in the case of a tax deed mere intention cannot be thus effectual, as mutual mistake will not cure an insufficient description. (p. 155.)

TAX SALES, Imperfect Descriptions in Prior Proceedings not Made Good by Perfect Description in the Deed.—If in the papers, books, and proceedings relating to the assessment and the advertisement and sale of property for delinquent taxes, the descriptions employed are inadequate, the proceeding cannot be given validity by inserting a sufficient description in the tax deed. (p. 156.)

TAX SALES.—The Maxim, "De Minimis Non Curat Lex," if applicable to tax sales, should be applied with caution. (p. 156.)

TAX SALES—Including Amount not Chargeable.—If the sum of six cents is purposely and erroneously added as a penalty, and the property is sold for eight cents more than chargeable against it, the sale is void. (pp. 156, 157.)

TAX DEEDS, When not Evidence of Title.—A tax deed not witnessed by the county treasurer, as required by statute, is not prima facie evidence of title. (p. 158.)

TAX DEED, Findings Required to Support.—To support a tax deed, the special findings should show that it was signed, witnessed and acknowledged by the persons required by statute. (p. 158.)

PRACTICE—Special Findings.—In a special finding all necessary facts must be stated with reasonable certainty, leaving nothing to be supplied by presumption or intendment. (p. 158.)

TAX SALES—Lien for Taxes Under Void Deed Passes to the Purchaser.—Though a tax deed does not pass the title to the grantee, he may thereby acquire the lien of the state and be entitled to the compensation provided by statute for his outlays. (p. 158.)

Spencer & Branyan, for the appellant.

Kenner & Lucas, for the appellee.

105 BLACK, J. The appellee, as plaintiff, recovered judgment quieting his title as the owner in fee simple to certain real estate, described in the judgment as follows: "Beginning at a point on the east line of Cherry street, sixty-six feet north of John street, running thence in an easterly direction parallel with John street one hundred and fifteen feet, thence northerly at right angles with said line sixty-eight feet, thence westerly parallel with John street to Cherry street one hundred and fifteen feet, thence southerly along the east line of Cherry street to the place of beginning sixty-eight feet; the same being a part of out-lot No. 2 in the original plat of the town (now city) of Huntington, Indiana"; and judgment was rendered in favor of the appellee against the appellant (defendant) for costs.

The court made a special finding, in which the following facts appear: March 28, 1892, one Murphy and his wife conveyed, by warranty deed, to the appellant, real estate in Huntington county, Indiana, described in the deed as in 106 the judgment herein, which deed was duly recorded March 30, 1892, in the recorder's office of that county, and was entered of record in deed record No. 66, page 8, of the records of that county. The appellant has never been a resident of this state and has never owned any personal property situated in this state, and, at the time of the finding, he had no other real estate in that county. Out-lot No. 2 in the original plat of the town (now city) of Huntington, of which the real estate described above is a part, was a regularly platted lot in the original plat in that town, and the original plat was duly recorded in the recorder's

office of that county. In 1849 one Kenower was the owner of the whole of this out-lot No. 2, and he afterward, at different times, sold and conveyed different parcels thereof to various purchasers, describing the parcels sold by metes and bounds. No subdivision or plat of the out-lot has ever been made or recorded in any public office, fixing the location or size of these different parcels. For convenience in listing for taxation, the county auditor "many years ago" assigned to each of these parcels certain numbers, running from 1 to 10, so describing the parcels upon the assessment list, duplicates and advertisements for delinquent taxes; and the county auditor, without making any record thereof, for his own convenience, assigned No. 9 to the tract in the out-lot owned by the appellant, described in the judgment herein. It was found that after the several parcels were so sold by Kenower, and prior to the year 1860, they were numbered from 1 to 10, inclusive; that these numbers were adopted by the several owners for identification, and by the auditor and taxing officers of Huntington county for convenience in listing and assessing taxes, and that this system of numbering "said lots, so adopted," had been maintained for such purposes ever since, and the real estate so described in the judgment herein, and so conveyed to the appellant by Murphy, "had been commonly known and designated on the tax duplicate as lot No. 9 in out-lot
107 No. 2 in the original plat of the town of Huntington, for forty years"; that on July 16, 1860, John Alexander was the owner of the undivided two-thirds of lots No. 2 and No. 9 according to this system of numbering, and he then deeded to Sylurius W. Alexander an interest in said real estate by the following description: "The undivided two-thirds of lots 2 and 9 in Kenower's division of out-lot No. 2 in the original plat of the town of Huntington, and described as follows: Commencing on Jefferson street at the southeast corner of a lot or tract of land in said town owned by David S. Tuttle, running thence west at right angles with Jefferson street to Cherry street; thence southward on Cherry street sixty-eight feet, thence at right angles and parallel to the first line of Jefferson street; thence north on Jefferson street to the point of beginning"; that this deed was recorded in deed record O, page 347, of the records of Huntington county, and "is of the title deeds through which" the appellant derives his title to the real estate in controversy;

that Sylurius W. Alexander deeded said real estate to Keziah E. Alexander, September 20, 1862, as recorded in deed record Q, page 459, by the same description; that Mary M. Frume, Angeline A. Irvin and her husband, and Maria L. Mills deeded said real estate to. Edith Alexander, September 1, 1869, as recorded in deed record Z, page 573, by the same description; that Keziah E. Alexander deeded to Sylurius W. Alexander an interest in said real estate by the following description: "Lots 2 and 9 in out-lot 2 in the town of Huntington," this deed being dated October 16, 1866, and recorded in deed record No. 29, page 370; that Sylurius W. Alexander deeded said real estate, November 11, 1869, to Henry Hessin and William Hessin, as recorded in deed record No. 29, page 402, by the same description as that in the above-mentioned deed, recorded in deed record O, page 347. It was found that "all said deeds are severally parts of the title deeds through which" the appellant derives his title to the real estate in controversy; that in [108] the years 1895 and 1897 the real estate described in the deed of Murphy above mentioned was regularly viewed and appraised for taxation as required by law, and it was designated in such appraisement by the following description: "Lot No. 9 in out-lot No. 2 in the original plat of the town of Huntington," and it was so listed and assessed in the name of the appellant; that this real estate was duly entered on the auditor's and treasurer's tax duplicates for the years 1896 to 1899, inclusive, in the name of the appellant and by the description "Lot 9 in out-lot 2 in the original plat of the town of Huntington." There are a number of findings relating to sales for city taxes to which we need not further refer, inasmuch as the conclusions of law in favor of the appellee are therein expressly based upon a conveyance of the county auditor, and we may confine ourselves to the facts relating to it.

It was found that the state and county taxes for the years 1896 and 1897 on said real estate were returned delinquent for nonpayment of said taxes, and the real estate was duly advertised for sale for such taxes on and before February 13, 1898, and on that day said real estate was duly sold for such taxes, and was purchased by the First National Bank of Huntington, Indiana, for forty-three dollars; that a penalty of six cents was in November erroneously added to the penalty that accrued in May, and the true

amount of delinquent penalty and current tax due at the time of the sale was forty-two dollars and ninety-two cents; that said purchaser received the statutory certificate therefor, and said real estate was described in said certificate as "In-lot 9 in original out-lot 2 in the city of Huntington, Indiana." The real estate was not redeemed from this sale, and February 21, 1901, the auditor of Huntington county duly executed and delivered to the First National Bank a tax deed for said real estate, which tax deed was in the statutory form, and conveyed the real estate by the following description: "In-lot No. 9 in the original out-lot No. 2 in the city of Huntington, Indiana, as described [109] in deed record No. 66, page 8." This tax deed was recorded February 22, 1901, in deed record No. 84, page 509, of the records of Huntington county. October 1, 1902, during the pendency of this action, said First National Bank conveyed all its right, title and interest in the real estate so conveyed to it to the appellee, who was substituted as plaintiff in this action, which had been commenced by the bank as plaintiff after the recording of its tax deed.

The court further found that the tract described in the deed of Murphy was the same as lot No. 9 in out-lot 2, and was the property which was duly listed for taxation in the county offices for the years 1895 to 1902, inclusive; that this tract was regularly listed and assessed for taxation for each of the years from 1895 to 1902 in the books of the auditor of said county in the name of the appellant, and under the description "Lot 9 in out-lot 2 in the original plat of the town of Huntington." It was found that the appellee had paid certain taxes and street improvement assessments, set forth in detail in the finding. It was also stated in the finding that "Lot 9 in out-lot 2 in the original plat of the town of Huntington," is a description which has been carried on the records and through the deeds of Huntington county for more than forty years, "and that such description and that set out by deed record No. 66, page 8 [the deed of Murphy to the appellant], and the tax deeds of the plaintiff in this case, is sufficient to locate and definitely describe the land, and that a competent surveyor can locate the same"; that the land described in the complaint herein and in the deeds mentioned in these findings was duly subject to taxation at the date of the assessment of the taxes thereon; "that the taxes, for the nonpayment of which

the land was sold, were unpaid, and that the land had been duly assessed for the taxes for which it was sold, and that the said land had never been redeemed according to law, and no certificate in proper form had or has been issued by the proper officer within the time limited by law for paying [110] taxes, or for redeeming from sales made for the nonpayment of taxes, or these taxes, stating that no taxes were due at the time such sale or sales were made, or any such certificate issued stating that the land in controversy was not subject to such taxation."

The court stated the following as conclusions of law: 1. That the tract of land described in the deed of Murphy, as above shown, is the same real estate described in the various public records for the collection of taxes as lot No. 9 in out-lot No. 2 in the original plat of the town of Huntington, and that this description is a sufficient description to identify the real estate described in the deed of Murphy; 2. That the deed from the auditor of Huntington county, dated February 21, 1901, to the First National Bank of Huntington, Indiana, conveyed a good and sufficient title to certain real estate, describing it, the description being that above set forth as the description in the judgment herein, and in the deed of Murphy; 3. That the appellee is the owner of said real estate, and has title thereto in fee simple; 4. That upon the facts found, as above stated, the law is with the appellee, and he ought to have his title quieted in and to the real estate described in conclusion No. 2, above set out, and that he recover of the appellant his costs in and about this cause laid out and expended.

1. Our statute (Burns' Rev. Stats. 1901, sec. 8624, Acts 1891, p. 199, sec. 206) provides that the tax deed, executed as prescribed, shall be prima facie evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and prima facie evidence of a good and valid title in fee simple in the grantee. Such prima facie evidence is not sufficient to establish title where it is affirmatively proved that in the sale or conveyance the description was so imperfect as to fail to describe the land or lot with reasonable certainty: Brown v. Reeves & Co. (1903), 31 Ind. App. 517, 68 N. E. 604.

2. If the descriptions in all the papers and books and [111] advertisements of the taxing officers prior to the execution of the tax deed were radically insufficient, we apprehend

that the mere fact that those officers had so employed such descriptions for a number of years would not cure them of their inadequacy for the purposes of the tax deed. The appellant received from his grantor a deed of conveyance in which the real estate was described by metes and bounds, and was stated to be a part of out-lot No. 2 in the original plat of the town (now city) of Huntington, Indiana, no reference being made to any numbered lot or in-lot in such out-lot. It does not appear that he had any notice of the designation of separate parcels of the out-lot by numbers, except what, if any, might be inferred from the mere use of such descriptions by the taxing officers, and the existence of such numbers in certain deeds of conveyance from owners of some portions of the out-lot, which deeds of conveyance were deeds through which he derived his title. Such descriptions, so far as they employed only such numbers of lots in the out-lot to indicate the property conveyed, were manifestly misdescriptions. The only ones of such deeds shown to have descriptions by metes and bounds purported to describe lots No. 2 and No. 9 in the out-lot, and the metes and bounds employed indicated for the two lots a width the same as the one parcel conveyed by Murphy to the appellant, and it cannot be known from such description of the two lots by metes and bounds that either of those lots was the land conveyed to the appellant.

3. In the matter of description of real estate, there is between deeds of conveyance executed by owners and tax deeds made by officers and based upon the prior performance of official acts an important difference. Faulty descriptions in the deed of conveyance of an owner of the land may serve because of the intention of the parties relating to the particular real estate so conveyed; but, in the case of a tax deed, mere intention cannot be thus effectual, and mutual mistake will not cure a radically insufficient [112] description. It is not impossible that one, by a sufficient conveyance, as that of Murphy to the appellant, may obtain a good title to land, in some of the conveyances of which, executed more than twenty years earlier, and forming links in the chain of title, there were radically defective descriptions, which would be inadequate for the support of a tax title.

4. It will have been observed that, in the execution of the tax deed in question, the description in the taxing papers

and books and in the certificate of sale given by the auditor was not treated as an adequate description for the tax deed, and there were added thereto the words, "described in deed record No. 66, page 8"; reference thus being made to the record of the deed of Murphy to the appellant. If such addition were legitimate, such supplementary reference would cure the inadequacy of the preceding portion of the description in the deed; but if in all the previous descriptions of the taxing officers, including that in the certificate of sale, there was insufficiency, the description could not thus be made good in the deed: See 2 Cooley on Taxation, 3d ed., 1000, and notes.

5. It has sometimes been held that in tax sales the maxim, "De minimis non curat lex," is not applicable, and there is much reason for such a rule, for there is no satisfactory standard for determining what, in such case, should be regarded as a very small sum; and the taxpayer should be strictly protected from all exactions, however small, in excess of what the government, by due, legal processes, has imposed upon him as his share of the public burden. The maxim, when deemed applicable, "is one to be applied with caution": 1 Cooley on Taxation, 3d ed., 591.

6. If the addition of so small an amount as eight cents could certainly be attributed to a mere miscalculation, and therefore could be regarded as unintentional, we might be inclined to regard it as unimportant (see Burt v. Hasselman (1894), 139 Ind. 196, 38 N. E. 598); but such a question is not before [113] us, for here it appears that the sum of six cents of this amount was purposely added; it being expressly found that "a penalty of six cents was in November erroneously added to the penalty that accrued in May, and the true amount of delinquent penalty and current tax due at the time of sale was forty-two dollars and ninety-two cents," instead of forty-three dollars, the amount for which the real estate was purchased at the tax sale: See Evansville etc. R. Co. v. West (1894), 139 Ind. 254, 37 N. E. 1009. There is no attempt to account for the additional two cents of the excess. As to a portion of the excess, there is an affirmative explanation inconsistent with its legality. It is not a case of a trifling excess in amount in a matter between individuals, but is one of the sale by the government, for its own benefit, of private property, for the payment of a sum, a portion of which taxing officials have added contrary to law. If such

administrative exaction were upheld as against one delinquent land owner, it would be allowable as against all other such land owners in the taxing district; and thereby a large amount, in the aggregate, might be imposed and taken without authority of law.

In O'Brien v. Coulter (1831), 2 Blackf. 421, it was said that whenever any authority is given to any person or officer of law, whereby the estates or interests of other persons may be forfeited and lost, such authority must be strictly pursued in every instance; that, in the sale of land for taxes, every substantial requisite of the law must be complied with. In that case a sale for taxes, small in amount, where a part of the property conveniently and reasonably could have been detached and sold separately, was held invalid.

In Doe v. M'Quilkin (1847), 8 Blackf. 335, where there was a sale of land for taxes, amounting to four dollars and forty-eight cents, of which the sum of eighty cents for county tax was not shown to be authorized by law, the sale for this reason was not upheld. This case was afterward referred to as holding that, unless the land was liable for all the taxes for which it was sold, [114] the sale could not be sustained: M'Quilkin v. Doe (1848), 8 Blackf. 581. In the case last named, a sale of land for road tax, county tax and state tax could not pass title, because the statute providing for the road tax and prescribing the mode of its collection had been repealed.

In Hutchens v. Doe (1852), 3 Ind. 528, where land was sold on two executions issued on two judgments in favor of the purchaser, and one of the judgments had been reversed as to the costs, and the sale was made for the payment of these costs, as well as the valid portions of the judgment, it was held that the purchaser did not acquire title. It was said: "The execution plaintiff caused the land to be sold for a greater amount than he had a right to make by virtue of his executions, and as he is not a bona fide purchaser without notice, he can take nothing by his purchase." The case was said to be analogous to a sale of land for taxes where the land was not liable for all the taxes for which it was sold; referring to M'Quilkin v. Doe (1848), 8 Blatchf. 581.

In 2 Cooley on Taxation, third edition, 955, it is said: "It has been shown in a preceding chapter that an excessive levy is void, whether it is made excessive by including with lawful taxes those which are unlawful, or in any other man-

ner. If the levy should be void, there would, of course, be nothing to uphold a sale. And if a valid levy were to be increased afterward by unlawful additions, the sale would be equally bad. The statutory power is a power to sell for lawful taxes and lawful expenses, and if it is exceeded by including unlawful items of either class, the power is exceeded and its exercise is invalid in toto from the manifest impossibility of saving the sale in part when the invalidity extends to the whole. Nor can the maxim 'de minimis' be applied so as to prevent a slight excess from invalidating the sale'': See, also, 27 Am. & Eng. Ency. of Law, 2d ed., 837; Key v. Ostrander (1867), 29 Ind. 1; Vail v. McKernan (1863), 21 Ind. 421.

7. A tax deed not witnessed by the county treasurer, as [115] required by the statute, is not prima facie evidence of title: Gabe v. Root (1884), 93 Ind. 256; Armstrong v. Hufty (1901), 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; Bowen v. Striker (1885), 100 Ind. 45.

8. In Essex v. Myers (1901), 27 Ind. App. 639, 62 N. E. 96, it was said that in a special finding in such a case it should be stated that the tax deed was signed, witnessed and acknowledged by the persons designated by the statute.

9. In a special finding all necessary facts must be stated with reasonable certainty, leaving nothing to be supplied by presumptions or intendments: Hill v. Swihart (1897), 148 Ind. 319, 47 N. E. 705.

10. Though by the auditor's deed of conveyance to the appellee's grantor the title to the real estate did not pass the grantee, and through him the appellee, acquired the lien of the state, and he may be granted the compensation provided by the statute in such case for his outlays.

Judgment reversed, with an instruction to state conclusions of law in accord with this opinion.

ON PETITION FOR REHEARING.

BLACK, J. 11. It has been suggested in the appellee's petition for a rehearing that since the finding of the court below the appellee has paid taxes upon the real estate in controversy. In order correctly to determine the amount for which the appellee is entitled to a lien upon the real estate, the court must be properly informed as to the amount of all subsequent taxes paid; and the special finding, therefore, does not show sufficiently all the facts on which to state con-

clusions of law anew. In order to give occasion for the introduction of evidence of such additional facts, we modify the mandate made on the original hearing, and remand the cause for a new trial.

A Description in a Tax Proceeding that is inherently defective cannot be aided by extrinsic evidence: Power v. Bowale, 3 N. Dak. 107, 44 Am. St. Rep. 511. The description of property in a tax deed must be certain in itself, and not such as to require evidence aliunde to render it certain: Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738. It seems that a tax deed will be held void, if the description is so uncertain and incomplete as to require the aid of extrinsic evidence to determine the boundaries therein mentioned: Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53; Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

CARR v. FIRST NATIONAL BANK.

[35 Ind. App. 216, 73 N. E. 947.]

EVIDENCE—Judicial Notice.—The Regulations of the Post-office Department are part of the public records of which courts take judicial notice. (p. 162.)

NOTICE OF NONDELIVERY of Registered Mail, When Must be Taken.—As the rules of the postoffice department prescribe that, upon receipt of registered mail, the addressee must sign a receipt, which must be immediately mailed to the sender, his failure to receive such receipt is notice to him that such mail has not been delivered. (p. 162.)

JUDGMENT by Default, When Will not be Opened Because of Want of Diligence.—If one sued in a county not that of his residence retains an attorney to defend the action, and the latter in turn employs a local attorney, to whom the answer is sent by registered mail, to be filed, and the latter, owing to his absence from home, does not receive such mail for eleven days, during which time judgment by default is entered against the client, such judgment will not be set aside on the ground of inadvertence, mistake or excusable neglect, when it appears that the attorney thus forwarding the answer must have known that it had not been received, because he had not been presented with any receipt by the postoffice authorities showing the delivery of the registered letter. (pp. 162, 163.)

ATTORNEY AND CLIENT.—The Negligence of an Attorney is the negligence of his client. (p. 163.)

L. A. Douglass and Elmer Wetzel, for the appellants.

Henry A. Burtt and James E. Taggart, for the appellee.

216 COMSTOCK, C. J. The appellee brought this action against Silas Carr, Emma Carr, his wife, and Thomas J. Brock, trustee of the estate of Silas Carr, to recover on a 217 note for two thousand dollars, given by said Silas Carr,

and secured by a mortgage executed by Silas Carr and Emma Carr, his wife, and asking that the mortgaged real estate be sold to satisfy it. Appellant Thomas J. Brock, as trustee, appeared and filed an answer to the action. Appellants Emma C. Carr and Silas Carr were defaulted upon personal service on the twenty-second day of September—being the second judicial day of the September term, 1903, of said court—and, upon such default, judgment was rendered against them, and a decree entered foreclosing the mortgage. The judgment provided that the proceeds arising from such sale, after the payment of the costs and the plaintiff's judgment, should be paid to the defendant Thomas J. Brock. On the second day of October, 1903, the appellants, Emma C. Carr and Silas Carr made an application, under section 399 of Burns' Revised Statutes, 1901 (Rev. Stats. 1881, sec. 396), to set aside the default. On the twelfth day of October, 1903, at said term of said court, the court overruled said application; and, after the court had overruled said application, the appellant Emma C. Carr asked leave of court to file the affidavit of Elmer Wetzel in support of said application, which motion was overruled. On the twenty-second day of February, 1904, at the February term, 1904, of said court, appellant Emma C. Carr filed a motion for an entry nunc pro tunc, showing that the affidavit of said Wetzel in support of her application to set aside the default was made before the court overruled her application to set aside said default. Said motion was also overruled by the court.

The errors assigned are that the court erred (1) in refusing the application of Emma C. Carr to set aside the default; (2) in refusing to permit appellant Emma C. Carr to file the affidavit of Elmer Wetzel in support of the application to set aside the default; (3) in refusing to grant the motion of Emma C. Carr for a nunc pro tunc entry of the affidavit of Elmer Wetzel in support of the application to set aside the default.

In the affidavit filed appellant Emma C. Carr, for the [218] purpose of having the default set aside, states that the mortgage in suit was executed by her codefendant, Silas Carr (her husband), and herself to secure the payment of a certain promissory note executed by said Silas Carr to the plaintiff; that immediately upon the service of the summons in said cause she consulted counsel in Indianapolis, where she was then residing, as to her rights in the premises, and

was informed by him that she had a meritorious defense to said action; that she thereupon retained him, giving him full power to make a proper defense therein; that said attorney prepared an answer and cross-complaint, which are made a part of the affidavit as exhibits "A" and "B." In her cross-complaint she alleges that she is now, and ever since March, 1890, has been the absolute owner of the property described in the mortgage in suit, purchased with her individual money, and that the loan mentioned in the complaint was not secured on the strength of the security of said property; that the loan was a part of a loan to said Silas Carr and others, made a year prior to the execution of said mortgage, and of which the affiant had no knowledge; that she executed the mortgage simply as surety for her husband, and received no part of the consideration thereof; that she was of the opinion at the time of the execution of said mortgage that said property was still in her individual name, and had been since March, 1900, and that she could not lose the property by executing said mortgage; that she did not at the time of the execution of said mortgage, or at any time since, entertain any thought that her property would be taken in satisfaction of said mortgage, until the filing of plaintiff's complaint. The answer of the complaint is a general denial.

The affidavit further contains substantially the same facts as set out in the cross-complaint, and, in addition, states that her attorney at Indianapolis retained the services of associate counsel at Jeffersonville to assist in the defense of this action; that said counsel was required to be absent from [219] the city of Jeffersonville during the first week of said September term of court; that said counsel at Indianapolis prepared the cross-complaint and answer, and on September 17, 1903, forwarded them by registered mail to said counsel at Jeffersonville; that the same were not received by him until September 28, 1903, owing to the fact that the postal authorities did not deliver the same by courier at the house of said attorney except upon written order, which written order said attorney did not know to be necessary, and he did not ascertain said fact until his return home, September 28th, aforesaid; that she was informed that on the second day of said term a judgment was entered, and that the same was taken through an inadvertency, mistake and excusable neg-

lect; that she at once prepared this petition to be relieved from said judgment, and now files the same. As shown by the record, Emma C. Carr, after the court had overruled the application to set aside the default, asked leave to file the affidavit of Elmer Wetzel, which application was refused. The affidavit of Mr. Wetzel shows his employment by Mrs. Carr; his preparation of the answer and cross-complaint heretofore given; that he retained counsel at Jeffersonville, and mailed said answer and cross-complaint by registered letter to said counsel, L. A. Douglass. It further appears that said Douglass associated with him at Jeffersonville another attorney, Mr. Phipps; that Mr. Douglass was absent from home when the answer and cross-complaint reached Jeffersonville, and during the first week of the court, but that he had engaged Mr. Phipps to look after the defense in his absence. The reason of Mr. Douglass' absence from home does not appear, nor does it appear that Mr. Phipps took any steps with reference to the defense of said cause.

1. The regulations of the postoffice department are a part of the public records of which courts take judicial notice: Caha v. United States (1894), 152 U. S. 211, 14 Sup. Ct. Rep. 513, 38 L. ed. 415.

220 2. These rules prescribe that upon the receipt of registered mail the addressee must sign and return a receipt, which must be immediately mailed to the sender. Mr. Wetzel should have received the return receipt in time to have taken further steps to defend said cause. Failing to receive said receipt was such notice to him that the papers had not been delivered to Mr. Douglass as to call upon him to take further action in said cause.

3. It appears, also, that Mr. Douglass, while the said answer and cross-complaint mailed to him were lying in the postoffice at Jeffersonville, was at Bowling Green, Kentucky, and that on the twentieth day of September, 1903, Mr. Wetzel received a letter from him written at said last-named place on the nineteenth of said month, from which he had reason to know that said answer and cross-complaint had not been received or filed by Mr. Douglass. Between that time and the default, September 22d, Mr. Wetzel is not shown to have taken any other step. There is nothing in the record to indicate that appellee did anything to mislead appellants. The entire record fails to show the diligence required of counsel—"such attention as a man of ordinary prudence

gives to his important business": Vick v. Baker (1898), 122 N. C. 98, 29 S. E. 64; Roberts v. Allman (1890), 106 N. C. 391, 11 S. E. 414.

4. The negligence of the attorney is the negligence of the client: Indianapolis etc. R. Co. v. Hood (1892), 130 Ind. 594, 30 N. E. 705.

As to the merit of appellants' defense there may be reasonable difference of opinion. Mrs. Carr signed the mortgage in question, believing that she was assuming no liability. This reason for asking to set aside the default would not impress a court favorably, but the lack of diligence was sufficient to warrant a denial of the petition.

5. In view of its minutes the court was best qualified to determine whether or not the court had decided the motion [221] to set aside the default before leave was asked to file the affidavit of Mr. Wetzel.

Counsel for appellee have argued at considerable length that no question is properly presented by the record. We have preferred to disregard the issue, and having carefully examined the whole record, conclude that it presents no ground for disturbing the judgment of the trial court.

Judgment affirmed.

Relief from Judgments on account of the negligence or mistake of an attorney is discussed in the monographic note to O'Brien v. Leach, 96 Am. St. Rep. 108-111. In the recent case of Anthony v. Karbach, 64 Neb. 509, 97 Am. St. Rep. 662, a judgment is vacated on the ground of the dishonesty of an attorney.

INDIANAPOLIS STREET RAILWAY COMPANY v. HAVERSTICK.

[35 Ind. App. 281, 74 N. E. 34.]

APPEAL AND ERROR.—An Assignment of Error is Waived by the failure to discuss it. (p. 164.)

NEGLIGENCE, CONTRIBUTORY, What is not.—An act done, or the failure to act, under such circumstances that a person of ordinary care, caution and prudence would not apprehend danger therefrom, is not such an act, or failure to act, as in law amounts to contributory negligence. (p. 166.)

STREET RAILWAYS—Riding on Running-board of Car, When not Contributory Negligence.—One who rides on the running-board of a car is not chargeable with contributory negligence if the car is full and he cannot get inside, and other passengers are already riding on the outside when he takes passage. (p. 166.)

JURY TRIAL—Instructions, Immaterial Error in.—An instruction that, to sustain the plea of compromise and settlement, it must appear that the defendant made a distinct proposition of settlement, which the plaintiff accepted, is not prejudicially erroneous when it appears that the offer was made by the defendant, and the court in another instruction stated to the jury that it made no difference who made such offer. (p. 167.)

EVIDENCE—Burden of Proof.—The Plea of Payment and Settlement tenders an affirmative issue, and the burden of proof must be assumed by the party interposing the plea. (p. 168.)

JURY TRIAL—Immaterial Error as to the Degree of Proof.—An instruction to the jury that a specified fact must clearly appear is not misleading nor prejudicially erroneous when other instructions show that it is necessary only that the fact appear by a preponderance of the evidence. (p. 168.)

EVIDENCE.—Complaints of His Sufferings Made by an Injured Person are admissible in evidence. (p. 169.)

EVIDENCE, When not Inadmissible as Stating a Conclusion.—The witness' reply to a question why he did not get up in a car, that it was so crowded that it was impossible for him to do so before he was hurt, is not inadmissible on the ground that it merely states a conclusion. (p. 170.)

EVIDENCE in Personal Injury Cases—Payment of Doctor's Bill.—It is not material, in a personal injury case, whether the plaintiff has paid all or a part only of his doctor's bill. (p. 170.)

F. Winter, W. H. Latta and Oscar Matthews, for the appellant.

David E. Watson, Homer L. McGinnis, Wilson S. Doan and Charles J. Orbison, for the appellee.

282 WILEY, J. Appellee recovered a judgment against appellant for injuries sustained by him while he was a passenger on one of its cars in the city of Indianapolis. His complaint was in one paragraph, to which an answer in two paragraphs was filed.

Two errors are assigned: 1. That the complaint does not state facts sufficient to constitute a cause of action; and 2. That the trial court erred in overruling appellant's motion for a new trial. The first error assigned is waived by appellant's failure to discuss it. The errors relied upon, as presented by the overruling of the motion for a new trial, rest upon certain instructions given by the court, and the admission and rejection of certain evidence.

The accident resulting in appellee's injury occurred on Thirteenth street, in the city of Indianapolis, where appellant maintained two street-car tracks parallel to each other, and over which it operated cars. The complaint avers that

appellant had taken up the south track, from a point near where Thirteenth street crosses the Lake Erie and Western Railroad Company's tracks, for a distance of about two squares east of said crossing; that appellant had provided a temporary switch, whereby the cars going outward were transferred from the south track to the north track, and [283] when so transferred they ran along the north track to a point where the south track was not torn up, and where the cars ran onto the south track by means of another switch. It is averred in the complaint that the car upon which appellee was riding was an open one, with the seats running crosswise, with a broad running-board or step upon one side, said step being on the south side of said car as the same was going eastward; that when appellee took said car all the seats were occupied; that persons were standing between the seats; that the platforms in the front and rear were occupied when appellee took passage thereon; that at the time he took passage on said car there were some twelve or fifteen passengers standing upon the running-board. It is further alleged that appellee stood upon the running-board of said car, and that the same was a safe place to ride had the car been operated in a careful and prudent manner; that appellant invited appellee to stand upon said running-board, and took his fare, and that appellant knew there was no other place upon said car that appellee could take passage; that appellant, when the car had reached the crossing of Thirteenth street and the tracks of the Lake Erie and Western Railroad Company, or near there, suddenly, negligently and without warning turned said car off of said south track onto the north track; that at the time it was dark and impossible for appellee to see. It is further averred that in Thirteenth street, just south of the north track, appellant had placed a number of poles upon which to support the electric wires, said cars being propelled by electricity; that said poles are placed at such a distance that only about a six-inch space is between them and a moving car. It is then averred: "And plaintiff says that it was dark and he could not see said poles, and that this defendant suddenly and negligently turned said car upon said north track, and suddenly and negligently increased the speed of said car to a high and dangerous rate, and suddenly, negligently and without warning passed one of said poles, negligently hurling the body of this plaintiff

[284] against one of said poles." The answer was a denial and an affirmative plea of settlement. To the second paragraph of answer a reply of denial was filed.

Of the several instructions given by the court, appellant predicates error only upon the eighth and thirteenth. These are as follows: "8. An act done, or a failure to act under such circumstances that a person of ordinary care, caution and prudence would not have apprehended danger therefrom, is not an act or failure to act, in law, as would amount to contibutory negligence. So in this case, if you find from the evidence that the car upon which plaintiff took passage was full of passengers, the seats being all filled, that after getting on said car he stood upon the running-board of said car, holding to the handholds upon the said car, such act of so riding upon said running-board of said car would not constitute negligence upon his part, such as would bar a recovery in this action. 13. As to the plea of compromise and settlement of plaintiff's cause of action and claim for damages in this action, I instruct you that the burden is upon the defendant to prove said plea of settlement and payment by a preponderance of the evidence. To sustain said plea of settlement and payment it must clearly appear that a definite and distinct proposition was made upon the part of the company defendant, which proposition in its terms was accepted by the plaintiff in settlement and adjustment of his claim for damages."

1. The eighth instruction correctly states an abstract proposition of law: Marion St. R. Co. v. Shaffer (1894), 9 Ind. App. 486, 36 N. E. 861.

In Pomaski v. Grant (1899), 119 Mich. 675, 78 N. W. 891, the court said: "Error is assigned on an instruction to the jury that it was not negligence for the plaintiff to ride on the running-board of this car. We think, in view of the testimony in the case, there was no error in this. The plaintiff testified that the car was full, and that he could not get inside, and this testimony was not disputed."

[285] In Graham v. McNeill (1899), 20 Wash. 466, 72 Am. St. Rep. 121, 55 Pac. 631, 41 L. R. A. 300, it was held that it is not contributory negligence, as a matter of law, for a passenger to stand on the platform, when the cars are full, in a position in which a person exercising ordinary care would be safe if the train was run in a careful manner. To the same effect are the following cases: Pendergast v.

Union R. Co. (1896), 41 N. Y. Supp. 927; Metropolitan R. Co. v. Snashall (1894), 3 App. D. C. 420; Cogswell v. West St. etc. R. Co. (1892), 5 Wash. 46, 31 Pac. 411; Clark on Accident Law (Street Railways), sec. 37; Nellis on Street Surface Railroads, p. 472.

Upon the question whether appellee was guilty of contributory negligence, the court fully and correctly instructed the jury in its seventh and ninth instructions. These instructions were applicable to the evidence, and we cannot believe that the jury was misled by the eighth instruction.

2. Appellant insists that the thirteenth instruction was prejudicial, for two reasons: "1. Because the court said it must clearly appear. This language placed on the appellant a heavier burden than the law imposes in proving its defense. 2. Because the court said to the jury that there could be a compromise only by a proposition from the defendant and its acceptance by the plaintiff. Now, we respectfully call attention to the fact that we alleged and proved that the proposition came from the plaintiff and was accepted by the defendant. In other words, the court virtually ruled out the whole question of settlement." The thirteenth instruction should be read in connection with the fourteenth. So much of that instruction as is pertinent is as follows: "But if you find that plaintiff and defendant came to an arrangement as to his claim for damages; that plaintiff agreed to accept two hundred dollars in full settlement of his claim; that defendant had accepted said offer, and offered and tendered plaintiff said sum in full payment of his claim for damages, [286] and has brought said sum into court for the use and benefit of plaintiff, then I instruct you that plaintiff is not entitled to recover in this action as to damages." The question of settlement between appellant and appellee is presented by the second paragraph of answer. The answer avers that appellant agreed to pay appellee one hundred and fifty dollars in full of all damages he sustained, and that the latter submitted a counter-proposition that, if the former would pay him two hundred dollars, he would accept the same in full settlement. It is then alleged that appellant accepted appellee's proposition, offered to pay him two hundred dollars, which he refused, and that thereupon it brought said sum into court for his use and benefit. So it appears from the answer that the initial step looking to a compromise was taken by appellant. Instruction 13 is in substantial har-

mony with the answer, and, read in connection with the fourteenth, was not misleading. As a question of law, it cannot matter from whom the proposition for settlement came. If one was made and accepted, it constituted a contract, and, in the absence of fraud, was binding on both parties: Cartmel v. Newton (1881), 79 Ind. 1; Fairbanks v. Meyers (1884), 98 Ind. 92; Brown v. Russell & Co. (1886), 105 Ind. 46, 4 N. E. 428.

3. The question of settlement was an affirmative issue tendered by the second paragraph of answer, and the burden of proving it was, as the court told the jury, upon appellant.

4. The thirteenth instruction was correct, unless the court was in error in saying to the jury that "it must clearly appear" that a definite proposition was made and accepted. In this instruction the jury were told that "the burden is upon the defendant to prove said plea of settlement and payment by a preponderance of the evidence." In another instruction the court properly told the jury what was meant by the expression "preponderance of the evidence." So it was left to the jury to determine, from a preponderance of the evidence, whether appellant had [287] established the defense set up in its second paragraph of answer.

In the case of Hart v. Niagara Fire Ins. Co. (1894), 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86, the trial court instructed the jury that before they could find the existence of a certain fact, they "should be satisfied by a clear preponderance of the evidence." In disposing of the instruction, the court said: "It seems to us that, in connection with the instructions given above, the phrase 'clear preponderance of the evidence' amounts to nothing more than a preponderance of evidence, or a distinct preponderance of evidence, which would, of course, be necessary to a verdict, as it must be a distinct preponderance before the preponderance can be ascertained. Construing the instructions together, we think the jury was not misled by the instructions."

Construing together the thirteenth instruction and that part of the fourteenth above copied and the instruction defining what is meant by the expression "preponderance of evidence," we do not think that the jury were in any way misled as to their duty. Neither do we think that instruction 13 placed on the appellant a heavier burden than the law imposed in proving its defense. As applied to the evidence, the instructions upon the question of compromise and

settlement fairly stated the law, and were not prejudicial to appellant.

5. It is next contended that it was error to admit evidence that appellee complained of pain after the injury. Appellee's wife testified that he complained of his back and hips hurting him. The admissibility of evidence of this character is no longer a question of debate in this jurisdiction. Of the many cases affirming that such evidence is admissible, we cite only the following: City of Alexandria v. Young (1898), 20 Ind. App. 672, 51 N. E. 109; Peirce v. Jones (1899), 22 Ind. App. 163, 53 N. E. 431; Carthage Turnpike Co. v. Andrews (1885), 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. 364.

288 6. The next question for our consideration is whether it was error to permit appellee to answer the following question: "Why did you not get up in the car?" To this question he made the following answer: "The car was so crowded that it was impossible for me to get there before I was hurt." The only reason urged why this evidence was not admissible is that it allowed appellee to state merely a conclusion. We do not think this objection is well taken. One of the questions at issue, and which the jury were called upon to determine from the evidence, was whether the appellee was guilty of negligence in riding upon the running-board of the car. Appellee, in his complaint, averred that appellant invited him to ride on its car by stopping the car and taking his fare, and that he was compelled to ride on the running-board because there was no room elsewhere in the car or on the platform for him to ride. These averments tendered an issuable fact, and it was proper for him to establish such fact. He charged that after the car passed from the south to the north track, which brought the running-board on which he was standing next to the poles, the speed of the car was suddenly and negligently increased as it passed one of said poles, thus inflicting the injuries of which he complains. Appellee testified that the passengers on the car said, "Look out for the poles," and that he tried to get between the seats to avoid them. Under the circumstances thus detailed, it was proper for appellee to tell why he did not get up into the car.

In Trumbull v. Donahue (1903), 18 Colo. App. 460, 72 Pac. 684, appellee was riding upon the platform of a car, and while there got his hand caught in the door of the car

when it was being closed, whereby he was injured. His excuse for being on the platform was that the car was so crowded he could not get in. In the course of the opinion the court said: "We think an allegation explanatory of the reason why the plaintiff was riding on the platform, and not in the car, was proper, and, if so, he had the right to [289] prove it. The allegation, as well as the evidence, concerning the crowded condition of the platforms is on the same footing. It explained how it was that the plaintiff was compelled to occupy the particular place on the platform he did and incur liability to the very injury which he received."

So far as the evidence complained of goes, it is intended to disclose a reasonable excuse why appellee could not avoid the danger into which appellant had invited him. It was not error to admit it.

7. On cross-examination, appellee testified that part of his "doctor bills" had been paid and part of them had not been paid. He was then asked the following question: "Which one of the doctors is it you have not paid?" Appellee objected to this question on the ground that it was not cross-examination. Whether it was cross-examination or not can make no difference. If the question was a proper and pertinent one, the refusal to permit the witness to answer it would not be reversible error. It was wholly immaterial, as between appellant and appellee, whether he had paid or not paid the doctors' bills incurred in the treatment of his injuries. If he had paid a part of such bills and a part was unpaid, he would still be liable for those unpaid. The answer to the question propounded could not possibly throw any light upon any issuable fact in the case.

Judgment affirmed.

If a Passenger Rides on the Side Steps of a street-car with the knowledge and consent of the conductor and from necessity for want of room to sit or stand inside, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers; but if he rides in such position when it is reasonably practicable for him to stand or sit inside the car, he takes upon himself the risk of his position: Woodroffe v. Roxborough etc. Ry. Co., 201 Pa. St. 521, 88 Am. St. Rep. 827. For other recent decisions on this question, see Freeman v. Pere Marquette R. R. Co., 131 Mich. 544, 100 Am. St. Rep. 621; Parks v. St. Louis etc. Ry. Co., 178 Mo. 108, 101 Am. St. Rep. 425; Fletcher v. Boston etc. R. R. Co., 187 Mass. 463, 105 Am. St. Rep. 414; Jackson v. Natchez etc. Ry. Co., 114 La. 981, 108 Am. St. Rep. 366.

SEMON BACHE & CO. v. COPPES, ZOOK & MUTSCHLER COMPANY.

[35 Ind. App. 351, 74 N. E. 41.]

A CONTRACT Lacking in Mutuality is not Enforceable. (p. 174.)

CONTRACTS, When Sufficiently Mutual.—A contract for a specified amount of glass, leaving the privilege to the party purchasing to change sizes from those specified or to cancel in an emergency such portion of the order as has not been taken in work by the other party, is not void for want of mutuality. (p. 174.)

CONTRACT, Right to Cancel in an Emergency, Meaning of.—A contract for glass, leaving the purchaser the right to cancel "in the event of an emergency," does not confer an arbitrary right of cancellation, but only in some unforeseen event or condition of circumstances, which, considering the character of the business, would furnish a substantial reason for canceling the contract. (p. 174.)

A CONTRACT is not Voidable Because One of the Parties has the Right to Cancel in the event of a decline in prices, if the other party declines to meet such price. In the absence of such decline, the contract is enforceable. (p. 175.)

A CONTRACT is not Voidable for Want of Mutuality because one of the parties is bound to order the goods only as his requirements demand. If he needs the goods he is not at liberty to procure them elsewhere. (p. 175.)

CONTRACT to Furnish Goods to Another.—An offer to furnish goods as they may be ordered is binding to the extent of orders made before any withdrawal of the offer. (pp. 176, 177.)

COURTS Should Construe Contracts so as to Sustain rather than defeat them, if this can be reasonably done. (p. 177.)

CONTRACTS—Parol Evidence Respecting the Meaning of the Word "Currently."—Where a party contracts to take goods currently, parol evidence is admissible of a conversation between the parties at or before entering into the contract concerning the word "currently." (p. 177.)

DAMAGES for Breaches of Contracts of Sale.—Where a party who agrees to furnish goods notifies the buyer that they will not be furnished, and the latter thereupon procures them as soon as he can at the market price, he may recover as his damages the difference between such price and the price for which he had originally purchased them. (p. 178.)

Miller, Drake & Hubbell, for the appellant.

Deahl & Deahl, for the appellees.

352 BLACK, J. The appellant was sued by the Coppes, Zook & Mutschler Company, appellee, and the other appellee, Hawks Furniture Company, was required to answer as garnishee.

The appellant questions for the first time, by assignment of error, the sufficiency of the complaint, and also assigns as error the overruling of the appellant's motion for a new trial.

The complaint against the appellant showed that the plaintiff and the appellant entered into a contract, May 22, 1902, which, it was alleged, was partly in writing and partly in oral terms. The three writings thus referred to were in substance as follows: First, by a writing dated at Nappanee, Indiana, May 22, 1902, addressed to the appellant at New York, New York, signed by the plaintiff, and [353] purporting to be accepted for the appellant by H. C. Feckheimer, the appellant was requested to enter the order of the plaintiff for French mirror plates and German bevel, all of certain sizes, at specific prices and terms of payment, designating the number of plates of each of the sizes indicated; "the same to be taken currently as specified on order between July 1, 1902, and January 1, 1903. We are to have the privilege of changing sizes from specifications furnished or of canceling, in event of an emergency, such portions of the order that have not been taken in work by you. Prices guaranteed against decline, and, in the event of receiving lower quotations, you to have the privilege of meeting same or else of canceling such portions of order that have not been taken in work, and likewise the balance of this contract. Should we at any time have occasion to notify you of lower quotations which you are unable to meet, it is understood that such portions of our orders as are in process of manufacture with you are to be taken by us at the price at which orders were placed."

Another writing of the same date, signed and accepted as was the first one above mentioned, purported to be an order by the plaintiff to the appellant to ship to the plaintiff at Nappanee, by a specified railroad, two thousand two hundred American Beauty mirrors, stating the prices and terms of payment, and stating the sizes and the number of each size, "to be shipped currently between June 1, 1902, and January 1, 1903."

The other writing, of the same date and place, addressed to the plaintiff, and signed by H. C. Feckheimer for the appellant, was as follows: "Referring to your order for 2,200 American Beauty plates, placed with Semon Bache & Co. through me to-day, I agree, and it should be so understood between us, that none of said orders are to be shipped, except

as may be specified and ordered by you from time to time, as your requirements may demand same."

[354] It was alleged in the complaint that the plaintiff, October 8, 1902, furnished specifications and ordered the appellant to prepare and ship to the plaintiff certain mirror plates, as in the contracts provided, patterns for which had theretofore been furnished by the plaintiff for the appellant, which the latter neglected, failed and refused to do; that at various other dates between that last mentioned and December 7, 1902, the plaintiff furnished patterns and specifications, and ordered and demanded the appellant to ship all the mirror plates contracted for under the terms of the contracts above mentioned; that the appellant failed, refused and neglected, "and still refuses to comply with the terms of said contracts, though the plaintiff has made frequent demands upon" the appellant to comply with and to carry out the terms and conditions of the contracts; that, because of the neglect and refusal, the plaintiff was compelled to, and did, purchase of other parties, at a much higher and greatly advanced price, such mirror plates, and was compelled to, and did, pay the sum of one thousand and sixty-six dollars and fifty cents in excess of the amount to be paid to the appellant under the contracts for such plates; that the plaintiff purchased such mirror plates at the lowest and best prices then obtainable; that it spent much time and means in making new contracts and negotiations for such mirror plates, and suffered great loss through the delay thus occasioned in getting the goods of the plaintiff upon the market, all to its damage in the sum of fifteen hundred dollars; that the plaintiff performed and complied promptly with each and all of the conditions and provisions of said contracts to be by it performed, and the damages aforesaid "have been occasioned" by and through the fault and neglect of appellant, without fault on the part of the plaintiff, all to its damage, etc. Wherefore, etc.

1. It is suggested by the appellant that the contracts sued on are too indefinite and uncertain, and are unilateral and not binding on the plaintiff, and therefore are not binding [355] on the appellant. The proposals set forth in the first two writings were not only signed by the plaintiff, but also accepted in writing on behalf of the appellant; and the third writing, which referred to the second, was signed on behalf of the appellant; but these facts would not render the con-

tracts enforceable, however clear and unambiguous in their terms, if one of the parties thereto was not thereby bound to do or give, or to refrain from doing or giving, something ascertainable by the terms of the contracts; that is, if, because of failure to impose any obligation on one of the parties, the contracts lacked mutuality.

2. Let us examine the writings separately. Referring to the first writing, the plaintiff stipulated that the goods were to be taken by the plaintiff currently as specified on order between specified dates; the plaintiff to have the privilege of changing sizes from those specified, or of canceling, in the event of an emergency, such portions of the order as had not been taken in work by the appellant. The plaintiff was thus bound to take, and therefore to order, the goods specified between the dates indicated, though it might require changes of specified sizes. The plaintiff would be bound to take the plates of the sizes specified in this writing, or to indicate changes desired, and to take the plates of other sizes as specified in ordering them. The plaintiff was not left at liberty to order or take if it wished or desired to do so, but was bound to take, by ordering, the plates of the kind indicated in this writing of the sizes indicated therein, or in the future orders which it bound itself to make within a specified time, except that the plaintiff reserved the privilege of canceling "in event of emergency, such portions of the order that have not been taken in work by" the appellant. This provision related to a future order whereby the plaintiff should propose to take currently any of the goods.

3. As to such portions of the goods thus ordered as [356] should not have been taken in work by the appellant after the giving of the order, the plaintiff was to have the privilege of canceling the order to that extent, "in event of an emergency." The nature of the "emergency" which should authorize a cancellation was not described. It would necessarily have to be some unforeseen event or unexpected combination of circumstances which, considering the character of the business to which the contract related, would furnish what might reasonably be regarded as a substantial reason for the cancellation. This would be a condition ascertainable by evidence. Such provision did not contemplate a cancellation at the mere wish or upon the simple dictation of the plaintiff. It was to be bound unless there should arise an actual condition which, having regard to the subject matter

of the contract, the plaintiff might reasonably pronounce to be an emergency in the business, and the plaintiff should, because thereof, direct the stoppage of further work under the particular order.

In People v. Lee Wah (1886), 71 Cal. 80, 11 Pac. 851, which was a prosecution for engaging in the practice of medicine without having procured a certificate, under a statute which declared that nothing therein contained should be construed to prohibit gratuitous service in cases of emergency, the court, holding that there was such an emergency as was contemplated by the statute, where there was an exigency of so pressing a character that some kind of action must be taken before any of the ordinary medical practitioners of the schools provided for by the statute, who were provided with the proper diplomas and had submitted themselves to the proper examination, could be readily obtained, instructed the jury that the facts of the case on trial did not constitute an emergency; and on appeal the trial court was sustained.

4. The privilege of the cancellation by the appellant of portions of an order and the balance or unexecuted part of the contract was made dependent not upon the mere wish
357 of the appellant, but upon a further decline of prices, and the election of the appellant not to meet the decline. Before the appellant could be thus released from further performance, it would be necessary that the appellant should have received lower quotations, a contingency which does not appear to have arisen, the prices having in fact advanced.

5. Concerning the second and third writings, it is to be observed that the goods to which they related were also to be shipped, and therefore to be accepted, currently between specified dates. They were not to be shipped except as specified and ordered by the plaintiff from time to time, as the plaintiff's "requirements" might demand them. This did not relieve the plaintiff from obligation to order and to take the goods, unless its requirements should not demand them. If it should need the goods in its business, it would not be at liberty, without liability to the appellant, to procure them from any dealer other than the appellant.

In National Furnace Co. v. Keystone Mfg. Co. (1884), 110 Ill. 427, the plaintiff, a manufacturing company using pig-iron in its business, contracted with the defendant, engaged in making pig-iron, to the effect that the plaintiff would

purchase from the defendant, and the defendant would supply to the plaintiff, all of a quantity of pig-iron which the plaintiff should need, use or consume, from one specified date to another, the amount supposed by the parties to be a specified quantity. It was held that the contract was not wanting in mutuality. The court said: "It is true that the appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed upon this part of the contract, in view of the situation of the parties." The appellee "had no right to purchase iron elsewhere for use in its business. If it had done so, the appellant might have maintained an action for a breach of the contract": See, also, Hercules Coal etc. Co. v. Central Investment Co. (1900), 98 Ill. App. 427; Wells [358] v. Alexandre (1891), 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218.

In Burgess etc. Fibre Co. v. Broomfield (1902), 180 Mass. 283, 62 N. E. 367, the defendants, by their written proposal, accepted in writing by the plaintiff, offered to pay the plaintiff a specified price per ton "for all your iron which you may desire to sell. This offer covers everything in the line of iron, whether located in your mill or on your premises, except galvanized iron, and is to be taken where found, we to assume all costs of removing the same, you to have privilege of indicating what you desire to have us take and of reserving what you wish. We furthermore agree to remove promptly all the iron which you wish us to take after acceptance of the proposition by you." The defendant refused to take the iron, and the plaintiff had it taken away by another dealer at a loss, and sued for the difference. It was held that the contract was valid and not lacking in mutuality. The court construed the contract in the light of the circumstances shown by the evidence stated in the opinion of the court: See E. G. Dailey Co. v. Clark Can Co. (1901), 128 Mich. 591, 87 N. W. 761; Ames-Brooks Co. v. Eetna Ins. Co. (1901), 83 Minn. 346, 86 N. W. 344.

6. If it might properly be said as to either of the writings that the plaintiff was under no obligation to order any of the goods, yet the obligation to furnish the goods would exist to the extent that they were in fact ordered by the plaintiff, as contemplated by the contract before the withdrawal of the offer to ship them. We think, however, that

the plaintiff by the written contracts engaged to make the orders. This is a reasonable construction.

7. "Courts are to construe contracts so as to sustain rather than to defeat them, if that can reasonably be done. Certainty, not uncertainty, is to be sought for. It is only after applying all the tests which the rules of law and of reason will permit to a contract, and a failure thereby to [359] discover, reasonably, what the parties agreed to, that the court should say it is too uncertain to be enforced": McCall Co. v. Icks (1900), 107 Wis. 232, 83 N. W. 300. See, also, Cherry v. Smith (1842), 3 Humph. 19, and note to that case in 39 Am. Dec. 150; Laclede Constr. Co. v. Tudor Iron Works (1902), 169 Mo. 137, 69 S. W. 384; Sheffield Furnace Co. v. Hull Coal etc. Co. (1903), 101 Ala. 446, 14 South. 672; Jordan v. Indianapolis Water Co. (1902), 159 Ind. 337, 64 N. E. 680.

8. On the trial, a witness, who at the time of the making of the contracts was treasurer of the plaintiff company and superintendent of its furniture department, having testified without objection that at that date he had a conversation with the agent of the appellant concerning the word "currently" in the contracts, was permitted, over objection, to testify in effect that when the contracts were entered into the plaintiff's factory was not constructed or built, and that the witness had a conversation with the appellant's agent as to the time when the factory would be completed so that the plaintiff could use the plates, and told him that it would be impossible for the plaintiff to use any of the plates earlier, that the plaintiff would not be in need of any of them, and for this reason would not want any of them shipped until the 1st of September, 1902, at the earliest, and that it might be some time later.

The contract evidenced by the first writing, as we have seen, provided that the goods to which it related were to be taken currently as specified on order between July 1, 1902, and up to January 1, 1903; and the goods referred to in the second writing were to be shipped currently between June 1, 1902, and up to January 1, 1903, as might be specified and ordered by the plaintiff from time to time, as the plaintiff's requirements might demand them. The first order for the shipment of plates was given October 8, 1902. It was not improper thus to permit the introduction of oral

evidence showing the situation of the plaintiff, [360] and the circumstances under which the contracts were made, known to both parties and considered by them at the time, not for the purpose of contradicting the contracts or of adding to the terms thereof, but of explaining the purposes for which the contracts were made, consistently with terms so wanting in precision as to admit of more than one construction, and to be susceptible of such explanation, and thereby to give effect to the understanding and purpose of the parties, without contradicting the terms of the contracts or making other contracts for the parties: See 2 Jones on Evidence, sec. 460; Kauffman v. Raeder (1901), 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; E. G. Dailey Co. v. Clark Can Co., 128 Mich. 591, 87 N. W. 761; Guaranty etc. Loan Assn. v. Rutan (1892), 6 Ind. App. 83, 33 N. E. 210. Whether the evidence was or was not admissible with reference to the goods to which the first writing related, it tended to show when the requirements of the plaintiff began to demand the goods to which the second and third writings related, agreeably to the understanding expressed in the third writing.

9. It is further claimed on behalf of the appellant that the damages were excessive, and that the finding was not sustained by sufficient evidence. We have carefully examined the evidence, and find little occasion for discussion concerning it. The goods were purchased by the plaintiff after being informed of the determination of the appellant not to furnish them. They were procured as soon as they could be obtained. They were bought at the market price and for the smallest price for which the plaintiff could purchase them. No attempt was made to show the contrary, and no objection is proposed to any evidence except as above mentioned. The evidence consisted of the contracts, certain stipulations on the trial, and the testimony of one witness introduced by the plaintiff. If what we have said concerning the contracts be correct, there was no available error.

Judgment affirmed.

An Agreement Optional as to one party and obligatory as to the other may be deemed a mutual contract and be enforced by the former: Cherry v. Smith, 3 Humph. 19, 39 Am. Dec. 150, and note. Where one contracts to sell and deliver to another from three hundred to five hundred tons of phosphate during a certain month, and the lat-

ter agrees to give ample notice of his wants twenty-four hours ahead of the time specified for the delivery of each order, and three hundred tons are delivered under the contract, if the purchaser then notifies the seller that he will exercise his option to take the remaining two hundred tons, and requests the seller to deliver the same, but the latter refuses to do so, the buyer may recover damages for breach of the contract: Dambmann v. Rittler, 70 Md. 380, 14 Am. St. Rep. 364.

CASES

IN THE

SUPREME COURT

OF

IOWA.

MYERS v. STONE.

[128 Iowa, 10, 102 N. W. 507.]

OPTIONS—Assignability of.—An option to purchase land, until exercised, creates no interest in the premises, and if the right of exercising such an option contained in a lease is limited to the lessee and "no other person," an assignment of the lease does not carry the right to exercise the option. (p. 182.)

OPTIONS—Assignment of—Estoppel.—A landlord under a lease giving the lessee, "but no other person," an option to purchase the leased premises, is not estopped to claim that such option was a mere personal privilege of the lessee, when the assignee of the lease asserting the right to exercise the option was clearly informed before the thing was done by him in reliance thereon that the lessee had no right to assign the lease. (p. 182.)

OPTIONS—Assignment of—Estoppel.—If a lease of a mine requires the lessee to keep the mine and machinery in repair for the full and complete operation of the mine, the placing of a pump and engine therein by an assignee of the lease for the purpose of removing water from the mine does not charge the lessor with notice of the intention of the assignee to insist on an option to purchase contained in the lease, nor estop him from claiming that the option is a personal right to the lessee alone. (pp. 182, 183.)

C. F. Howell, L. C. Mechem and W. R. C. Kendrick, for the appellant.

H. E. Valentine, for the appellees.

[11] LADD, J. The term of plaintiff's leases of the land in controversy to McDonald, subsequently assigned by him to defendants, expired October 1, 1904. Prior to the beginning of this action performance had not been in strict compliance with the conditions of the contracts, but a careful examination of the record has convinced us that the breaches, such as might have entitled plaintiff to a forfeiture, were waived,

and that plaintiff is estopped from objecting to the assignment. No doubtful proposition of law is involved in these issues, and a review of the evidence bearing thereon would serve no useful purpose.

2. Aside from claiming the benefits of the leasehold, [12] the defendants insist that they also acquired the privilege to exercise the option of purchasing the premises. Among other things, the principal lease provided that: "If the party of the second part shall fully comply with each and every covenant and agreement contained in this lease and the coal lease as aforesaid named, the said second party, but no other person, shall then at the time of the expiration of this lease, and not thereafter, have the option of purchasing the land herein leased including all the coal thereunder and the coal underlying the north ten acres of the northwest quarter of the northwest quarter," describing it, and fixed the price to be paid. Generally, an option may be defined as a contract by which an owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a specified time: Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695. It is neither a sale of land nor an agreement to sell, but merely the disposal of the privilege of electing to buy at a fixed price within the time limited. The other party acquires no land, nor interest in land, not even a chose in action, prior to his election, but he does obtain, what is often of much value, the privilege, at his election, to demand and receive the conveyances of land. The nature of such a contract was pointed out in Sweezy v. Jones, 65 Iowa, 272, 21 N. W. 603, where the court, speaking through Adams, J., said: "The person holding the right of option is not a purchaser. He becomes such only by exercising his right of option, and not until he becomes a purchaser does he acquire anything which a court of law or equity can recognize. We do not think, indeed, if Jones had had nothing more than a mere right of option not exercised, that it would have been claimed that he had anything that could have been sold upon execution." This was followed in Conn v. Tonner, 86 Iowa, 577, 53 N. W. 320, in holding that a mortgage of the leasehold did not cover the lessee's option to purchase: See, also, Newton v. Newton, 11 R. I. [13] 390, 23 Am. Rep. 476. In its very nature an option is subject to such limitations as the owner may impose. He may make its exercise dependent upon the performance of conditions precedent

contained in the same contract, as of a lease; or, for reasons appearing sufficient to himself, he may restrict the privilege of buying to a single individual. The right to discriminate between purchasers freely is one of the attributes of private ownership of property, and the reasons which lead to it are not the proper subjects of judicial inquiry. They inhere in the right to freedom of contract. But in the instant case the very nature of the option obviated the possibility of its transfer to another. It was granted to the lessee named, but to no other person, and this necessarily excluded all others, and constituted it merely a personal privilege, which was no more assignable than rights arising out of contracts involving relations of personal confidence: See Menger v. Ward, 87 Tex. 622, 30 S. W. 853; Hosford v. Metcalf, 113 Iowa, 240, 84 N. W. 1054; Sutherland v. Parkins, 75 Ill. 338; Meynell v. Surtees, 3 Smale & G. 101; contra, Gustin v. Union School Dist. of Bay City, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156.

3. Appellees also contend that Myers is now estopped from claiming that the option to purchase is a mere personal privilege, not assignable, and that it did not pass to them with the lease. It is not pretended that he consented to transfer of the option to them. If in the first talk with J. J. Stone a purpose not to object to the assignee's exercising the option might be inferred, that conversation occurred after the assignment of the lease by McDonald to J. J. Stone & Son, and before anything was ever done in reliance thereon. In another conversation Stone was plainly informed by Myers that McDonald had no right to lease anything or assign anything to him. The payment of rent had no connection with the option, as that might be collected even though the option were never exercised; nor did the taking of possession of the [14] property and the operation of the mine, for these also were independent of any undertaking with reference to the purchase.

The only remaining question is whether the improvements made by defendants were of such a character as to apprise Myers of defendants' intention to exercise the option. In the absence of knowledge to the contrary, he had the right to assume that whatever was done in and about the mine was in compliance with the terms of the lease, or in order to secure the profits to be obtained in the operation of the mine during its continuance. By the terms of the contract the lessee

was bound to maintain the shaft, with all entries and rooms connected therewith, in repair for the full and complete operation of the mine, and also to keep all machinery and coal-cars and other personal property situated on the premises and used in connection with the mine in a safe and complete state of repair. If a pump and an engine were placed in the mine, the object was to remove the water in order that defendants might better work it. These were readily movable when no longer needed. Nothing was done which necessarily indicated a purpose to purchase the premises, and, even if there had been, it was in the face of Myers' warning that McDonald could assign nothing. The evidence utterly failed to sustain the plea.

Other matters are discussed, but, in view of the conclusion reached, do not require attention. One-half the costs will be taxed to each party.

Reversed.

Deemer, J., dissenting.

The Question Whether an Option to Purchase creates an interest in the land is discussed in Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894; Gastin v. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 361; Bras v. Sheffield, 49 Kan. 702, 33 Am. St. Rep. 386; Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881. While an option to purchase, if based on a consideration, binds the person granting it, it is not a contract of purchase until acceptance, but is simply a contract granting a privilege to purchase, and binding the grantor to convey the property only when the terms are accepted and complied with: Tilton v. Sterling Coal etc. Co., 28 Utah, 173, 107 Am. St. Rep. 689. As to the assignability of an option to buy, see La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 21 Am. St. Rep. 63.

WILLIAMS v. MINERAL CITY PARK ASSOCIATION.

[128 Iowa, 32, 102 N. W. 783.]

THEATERS AND SHOWS—Negligence of Manager.—If a person, occupying a paid seat in a grand stand erected by an amusement association is injured by the fall of a bottle from an elevated bandstand, an instruction that if ordinary care for the protection of people in the grand stand required that the space between it and the bandstand should have been inclosed with a netting or other barrier, failure to provide it is negligence, and if by reason of such negligence such person was injured, he has the right to recover, sufficiently covers the association's duty to exercise due care in the premises. (p. 186.)

TRIAL—Instructions—Appeal.—If an instruction is right as far as given, and the party complaining fails to call the attention of the trial court to a further proposition urged for the first time on appeal, there is no ground to allege error. (pp. 186, 187.)

MASTER AND SERVANT.—Negligence of a servant for which his master must respond to a third person is negligence in some act, or failure to act, within the scope of his employment, and if the members of a band, engaged to furnish music for a public entertainment, while drinking negligently drop a bottle, which injures a person who has paid admission to such entertainment, he cannot recover therefor from the manager of such entertainment. (p. 187.)

THEATERS AND SHOWS—Care Required of Owner or Manager.—In the erection of buildings, stands, platforms and other elevated structures upon grounds to which the public is invited for amusement, the owner or manager thereof must use reasonable care not to create or permit conditions which endanger persons or visitors who are in their proper place, or in seats provided for their use. (p. 187.)

THEATERS AND SHOWS—Care Required of Owner.—The undertaking of the proprietor of a place of public amusement for the safety of his patrons is not so similar to that of a common carrier of passengers as to call for an application of the same rule of responsibility. Reasonable care on the part of the former is all that is required. (p. 188.)

M. E. Mack and J. B. McCrary, for the appellant.

Healey Brothers & Kelleher, for the appellee.

33 WEAVER, J. The defendant association is a corporation under whose management and direction a place or field for public amusement has been established at or near the city of Fort Dodge, Iowa. Within this inclosure is erected a so-called "grand stand," or amphitheater, containing benches or seats for the accommodation of the people attending the races and other exhibitions there given. Over the central portion of this amphitheater, at a height of some

twenty-five feet, is a platform intended to be occupied by a band of music. This platform was inclosed by a rail two by four inches in size extending around the four sides about three and one-half feet from the floor. On three sides, near the rail, were benches for the accommodation of the musicians. [34] Except as described, the platform was inclosed by no barrier or netting to guard against the fall of any substance or article from the platform upon the audience seated below. An entrance fee was collected from visitors for admission to the grounds, and an additional fee for a seat in the amphitheater. Upon the day in question certain races had been provided by the defendant, to which, by the usual methods of advertising, the public was invited. The plaintiff attended the entertainment, paid the usual charges for admission to the ground and to the amphitheater, and was given a seat below the band platform. While sitting in the place thus provided, and without any apparent fault on her part, a quart bottle was dropped or fell from the platform upon the head of the plaintiff, resulting, it is alleged, in her serious injury. The plaintiff's petition sets out these facts, and charges the defendant with negligence (1) in constructing the platform without netting or other barrier to guard against such injuries to persons seated below; and (2) in giving the plaintiff a seat under said platform, when, in the exercise of due care, it should have known and provided against the danger to which she was thus exposed.

There was evidence tending to show that on one or more occasions during the day, and prior to the accident, bottles of some kind had been seen upon the platform floor, and it is the theory of the appellant that the bottle by which she was hurt rolled or was in some manner crowded or pushed from said floor. No one testifies to seeing anything of this kind, but it is sought to be inferred from the facts above stated. On the other hand, a witness for the defendant testifies to having seen a member of the band pick up from the floor two quart bottles, and in attempting to hold them on the rail with one hand, while he reached for a third with the other hand, a bottle slipped from his grasp and fell over the rail. The witness, who was also a member of the band, immediately went below, and learned [35] that plaintiff was injured, evidently by the bottle which he had seen fall.

1. Appellant's counsel have given considerable attention in argument to the measure of duty incumbent upon the de-

fendant to provide and care for the safety of persons attending its exhibitions, to which the public is invited. For the purposes of this case, most of the propositions advanced on this subject may be admitted. We find, however, by reference to the record, that, generally speaking, the trial court adopted the theory now contended for as regards the law of negligence, and instructed the jury accordingly. For instance, it is the claim of counsel that due care on part of the defendant required the inclosing of the space between the rail above referred to and the floor of the platform with boards or netting, or other barrier, and that such protection, if provided, would have prevented the accident to plaintiff. Now, the trial court distinctly instructed the jury that, if ordinary care for the protection of the people below required the use of any such device, the failure to provide it was negligence, and if, by reason of such negligence plaintiff was injured, she was entitled to a verdict. This instruction seems fairly and fully to cover the entire contention of the appellant on this branch of the case. It is not, and could not well be, contended that the failure to provide the barrier was negligence as a matter of law. If that be true, the court could do no more than to instruct, as it did instruct, and leave the question to the determination of the jury. The jury found the fact against the plaintiff, and we cannot say that the verdict is without support in the testimony.

2. It is further claimed that defendant was negligent in failing to exercise such care and control over the use and occupancy of the band platform as was required for the safety of persons seated below. There is evidence tending to show that dealers in various [36] kinds of liquids were permitted to carry their wares to persons on the band platform, and that bottles of such kind were seen on the floor; and it is said that due care on the part of defendant required it to keep the platform clear of such obstructions. In this, as in respect to the other charge of negligence, we have to say that the question thus presented was for the jury, and was fairly submitted to their consideration.

It is argued that an instruction which told the jury that defendant would be liable for the negligence of its officers is erroneous, because it did not refer to the acts of its agents, servants and employés, as well as its officers. The instruction being unquestionably right as far as it went, and plaintiff having failed to call the court's attention to the further prop-

osition now suggested, there is no ground to allege error: Wimer v. Allbaugh, 78 Iowa, 79, 16 Am. St. Rep. 422, 42 N. W. 587; Churchill v. Gronewig, 81 Iowa, 449, 46 N. W. 1063; State v. Viers, 82 Iowa, 397, 48 N. W. 732; Wheelan v. Chicago etc. R. R., 85 Iowa, 167, 52 N. W. 119.

Complaint is made of an instruction to the effect that, if members of the band were drinking beer on the platform, and one of them carelessly dropped the bottle which injured the plaintiff, the defendant would not be liable. Counsel profess to believe this charge was "grossly unfair, very misleading, and injects something into the case not alleged or proven by either party, and takes away from the jury one of the vital points in the case." We do not so view it. There was evidence from which it might be found that beer was being consumed by some persons in and about the stand, and that the instrument of plaintiff's injury was a beer bottle. Certainly the mere fact that a member of the band, whether he was the employé of the defendant or of the band director, carelessly dropped a bottle upon the plaintiff would not sustain a charge of negligence against the defendant. The negligence of the servant for which the master must respond to [37] a third person is negligence in some act, or failure to act, within the scope of his employment. This is elementary, and requires no citation of authorities. So far as the record shows, the employment of the band was for no other purpose than to provide music for the occasion, and ordinarily, at least, the relation of beer to harmony of sound is not so obvious or necessary that the passing of bottles between members can be said to be within the scope of a musician's employment. We are unable to see how the instruction complained of could in any manner have prejudiced the plaintiff's case. Exceptions are taken to other instructions, but we cannot notice them in detail without unduly prolonging the opinion. We have examined them all, and find no error.

We are not sure that we quite understand the proposition of counsel that "the obligation of care and control by defendant over its seats in the amphitheater and the right of its patrons to use them in safety extends upward indefinitely for the purpose of their use and enjoyment, and the duty of defendant is commensurate with this obligation." If thereby it is meant to say that in the erection of buildings, stands, platforms and other elevated structures upon grounds to which the public is invited, the defendant must use rea-

sonable care not to create or permit conditions which endanger the persons of visitors who are in their proper place, or in seats provided for their use, there can be no dispute of the correctness of the statement. We think, however, that this principle, so far as applicable, was fairly embodied in the instructions. As bearing upon the degree of care which the law imposes upon the owners and managers of exhibitions and places of amusement, the decided cases are not numerous, but, so far as the courts have expressed themselves, it appears to be settled that reasonable care in such case is the measure of duty. We are therefore not prepared to accept counsel's contention that, when "plaintiff placed her person [38] in defendant's hands for a consideration" it created "a sort of bailment, just as if she had placed herself in a railroad's hands as passenger." It would require too much ingenuity to adjust the law of bailments to the implied contract which arises between the proprietor of a place of public amusement and the visitor who attends such place upon the proprietor's invitation; and the undertaking of such a proprietor is not so similar to that of a common carrier of passengers as to call for an application of the same rule of responsibility. As holding to the rule of reasonable care in such cases, see Hart v. Washington Park Club, 157 Ill. 9, 48 Am. St. Rep. 298, 41 N. E. 620, 29 L. R. A. 492; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788; Lane v. Minnesota S. A. Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708; Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; Scofield v. Wood, 170 Mass. 415, 49 N. E. 636; Dunn v. Brown Co. A. Society, 46 Ohio St. 93, 15 Am. St. Rep. 556, 18 N. E. 496, 1 L. R. A. 754; Mastad v. Swedish Brethren, 83 Minn. 40, 85 Am. St. Rep. 446, 85 N. W. 913, 53 L. R. A. 803; Richmond etc. Ry. Co. v. Moore's Admr., 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; Thompson v. Lowell etc. R. R., 170 Mass. 577, 64 Am. St. Rep. 323, 49 N. E. 913, 40 L. R. A. 345; Sebeck v. P. V. Verein, 64 N. J. L. 624, 81 Am. St. Rep. 512, 46 Atl. 631, 50 L. R. A. 199.

Counsel for appellee have dwelt at some length upon the theory that the band, or its director, is to be considered as an independent contractor, which had undertaken to furnish the music for defendant's exhibition, and that the latter cannot be held liable for any negligence of the former. The rule contended for is certainly not correct in all cases (see Richmond etc. R. R. Co. v. Moore's Admr., 94 Va. 493, 27 S. E.

70, 37 L. R. A. 258; Sebeck v. P. V. Verein, 64 N. J. L. 624, 81 Am. St. Rep. 512, 46 Atl. 631, 50 L. R. A. 199), though it would doubtless be applicable under some circumstances. The case before us may readily be disposed of without passing upon that branch of the discussion, and we shall not attempt to do so.

The record before us presents a controversy which is [39] almost wholly one of fact for the consideration of the jury. It has been so considered, and it is not within our province to disturb the verdict.

Appellants have filed a motion to tax the appellee with the cost of an amended abstract filed by it in this court. An examination of the amendment indicates that it supplies some material omissions from the principal abstract, and the motion is overruled.

The judgment appealed from is affirmed.

The Liability of Proprietors of Theaters and other places of public amusement is discussed in the monographic notes to Sigel's Estate, 110 Am. St. Rep. 532; Woodward v. Miller, 100 Am. St. Rep. 196; Mastad v. Swedish Brethren, 85 Am. St. Rep. 449.

IDA COUNTY SAVINGS BANK v. SEIDENSTICKER.

[128 Iowa, 54, 102 N. W. 821.]

OFFICIAL BONDS—Cashier's Bond—Liability of Sureties.—A cashier's bond which does not expressly limit the period of its operation must be read in connection with the terms of the appointment under which he holds his office, and if such appointment is for a definite period, the bond ceases to be effective upon the expiration of the term so designated. (p. 196.)

PAYMENTS—Application of.—Payments and credits on an account, in the absence of any agreement or direction for their application elsewhere, should be applied to the satisfaction of those items or claims which are earliest in point of time. (p. 197.)

M. J. Wade, T. F. Bevington and J. L. Kennedy, for the appellants.

W. E. Johnston, Wright & Call and Hubbard & Burgess, for the appellee.

[55] WEAVER, J. In the year 1893 the First National Bank of Ida Grove, Iowa, ceased to do business, and transferred its assets to one J. T. Hallam. Soon thereafter Hal-

lam, who had been conducting a private bank, united with others to organize the plaintiff bank, himself becoming the owner of something more than two-thirds of the capital stock. The defendant, C. J. Seidensticker, who had been employed in the national bank, and subsequently by Hallam in his private bank, became the plaintiff's first cashier, and as such gave the bond now in suit, with the defendant F. C. Knepper as his surety. The condition of the bond is in the following words: "The condition of this bond is such that, Whereas, the said Chas. J. Seidensticker has [56] been elected cashier of the Ida County Savings Bank, within Ida Grove. Now, if he shall well and truly perform the duties of the office of cashier, according to the by-laws of said bank, and the law of the state of Iowa governing savings banks, and exercise all reasonable care and diligence, and the preservation and lawful disposal of all moneys, books, papers and securities belonging to the bank, then the bond to be void, otherwise of force and effect." At the beginning of each bank year the board of directors re-elected the cashier, and he continued in the position until March, 1897, when he absconded. During all the period of Seidensticker's service in this capacity, Hallam, who has since died, was the president and the active superintendent or managing officer of the bank. On November 20, 1897, the plaintiff brought an action upon said bond, alleging that, in violation of his duties as cashier, Seidensticker had taken, appropriated and converted to his own use moneys of the bank to the aggregate amount of seven thousand nine hundred and fifty-nine dollars and forty-one cents, for which sum judgment was demanded against him and his surety. The surety denies liability on various grounds, to which reference will be made in the progress of this opinion. A reversal of the judgment entered below upon a directed verdict is claimed upon numerous alleged errors.

1. The first question to be considered is whether the bond sued upon created a continuing obligation upon the surety so long as Seidensticker might be retained as cashier of the bank, or is to be limited in time to the first year of said cashier's service. To properly answer this inquiry, reference to the statute governing savings banks, and to the facts and circumstances attending the giving of the bond, becomes necessary.

The statute invests savings banks with the power to appoint such officers, agents and employés as the business transacted by them may require: Code, sec. 1844. It [57] also pro-

vides for the annual election of a board of directors (section 1846), and makes it the duty of such board at their first meeting, and as often thereafter as the by-laws require, to elect from their own number a president and vice-president for the ensuing year, and appoint a treasurer or cashier and such other officers and employés as may be required, who shall hold their office during the pleasure of the board, and give such security for the performance of their duties as may be required of them by the by-laws (section 1845). The by-laws of the plaintiff bank, as offered in evidence, repeat in substance the statutory provision above cited, and provide in general terms that the president, cashier and employés of the bank shall give bonds in such sums, with sureties, as the board of directors shall approve. The board is also given power by a majority vote to remove at any time any or all of the officers or employés and appoint others in their stead. In actual practice the board adopted the plan of electing or appointing the cashier annually at the time of the regular annual election of president and vice-president. The records of the corporation show that the first regular meeting of the board of directors was held on May 30, 1893, and that Charles J. Seidensticker was "appointed cashier until the next annual election." At the same meeting it was voted that the president be required to give bond in the sum of fifty thousand dollars, and the cashier in the sum of ten thousand dollars, to be approved by the board. The cashier's salary was at the same time fixed at one thousand dollars per year until further ordered. The second annual meeting occurred on May 31, 1894. The record of this meeting recites that a motion that Charles J. Seidensticker "be elected cashier for the next year" was carried. At the third annual meeting, held June 4, 1895, it is recorded that a motion that "Charles J. Seidensticker be appointed cashier for the ensuing year" was carried, and that his salary was fixed at eight hundred and forty dollars per year. No record seems to have been preserved of the annual meeting [58] of the year 1896. Seidensticker testifies that such a meeting was held and he was again reappointed for the ensuing year, and this is not disputed. These four successive appointments cover the entire period of the cashier's service. The bond in suit was executed after the first election, and was approved and accepted by the board of directors about June 27, 1893. It was never renewed, nor was any other bond or security for the perform-

ance of his duties ever required of the cashier while he remained in the bank's service. It is the contention of the surety that the bond is to be construed with reference to the term of the appointment or election of Seidensticker to the office of cashier. In other words, the proposition is that, Seidensticker having been appointed to serve in that capacity for the period of one year, subject, of course, to the reserved right or power of the board of directors to remove him at an earlier date, the bond given to secure his faithful discharge of the duties of his office will not operate to bind the sureties for defalcations occurring after the expiration of such term and under another and different appointment. The question is one upon which there is some apparent confusion in the cases, but, when closely examined, the want of harmony is apparent rather than real.

It is elementary that a surety, especially one who assumes that relation as a mere matter of accommodation to one or both of the principal parties, is entitled to rely upon the strict terms of his contract, and his liability will not be extended or enlarged by implication: Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189. It is equally well settled that, in the absence of stipulations making the contrary intention clearly and unequivocally apparent, the obligation of a surety upon an official bond does not extend beyond the term or period of service to which such officer had been appointed or elected when the bond was given: Wapello County v. Bigham, 10 Iowa, 40, 74 Am. Dec. 370; Fresno E. Co. v. Allen, 67 Cal. 505, 8 Pac. 59; South Carolina Soc. v. [59] Johnson, 1 McCord, 41, 10 Am. Dec. 644; Chelmsford Co. v. Demarest, 7 Gray, 1; Moss v. State, 10 Mo. 338, 47 Am. Dec. 116; Bigelow v. Bridge, 8 Mass. 275. But there is a class of cases in which the application of the last-mentioned rule has given rise to differences of opinion. They relate, generally speaking, to officers for whom the law which authorizes their appointment has fixed no definite term of service, and are removable at any time at the pleasure of the appointing power, but are nevertheless appointed and reappointed to successive definite terms, as was done in the case at bar. A line of decisions is to be found which appear to hold with more or less strictness that a bond given by such officer upon his first appointment is a continuing obligation upon the surety, unless the contrary intention is clearly manifest in the terms of the instrument. The case most often cited in support of this

holding is Amherst Bank v. Root, 2 Met. (Mass.) 522, which was an action upon a cashier's bond. The statute of Massachusetts at that time authorized the board of bank directors to appoint a cashier and other officers, who should "retain their places until removed therefrom or others are appointed in their stead." The defendant Root was appointed cashier from year to year for several years, but gave no bond, save the one made to the bank upon his original appointment. That bond recited generally that Root had been appointed cashier, and was conditioned upon his faithful performance of the duties of the position. The sureties were directors of the bank. It was held by a divided court that an action would lie upon the bond for the cashier's default, which occurred in the later years of service. The majority opinion concedes the general rule that the bond of an officer appointed for a fixed or limited term imposes no obligation on the surety for the conduct of his principal under a reappointment, but gives controlling force to the statute providing that a cashier "shall retain his office until removed therefrom," and shall give bond "conditioned for [60] the faithful performance of the duties of his office." "This provision," the opinion says, "regulates the office of cashier, and fixes the term by which it is held," and upon this theory of the effect of the enactment it was decided that the bond must be held to have been given to cover the entire time of the cashier's service until he should be "removed" or another be "appointed in his place."

Even if we accept this construction as correct, we think our statute, which provides that the cashier shall hold his office "at the pleasure of the board," is not the equivalent of the Massachusetts act. A statute which unequivocally gives the cashier the right to retain his office until removed may, without violence to the meaning of these words, be held to imply an absence of authority in the board of directors to require an annual appointment or reappointment of a cashier whose services are found to be satisfactory, while a provision that he shall hold his office at "the pleasure of the board" does not have that obvious effect. It is a fair construction of this provision to say that, while retaining the right to remove him at any time, the board may properly pursue the plan of appointing or employing a cashier for a year at a time, and make the annual reappointment a condition precedent to his right to continue in such position.

That the majority opinion in Amherst Bank v. Root, 2 Met. 522, is made to turn upon the construction of the local statute has been distinctly held by the Massachusetts court, in Richardson School Fund v. Dean, 130 Mass. 242. In that case the charter of a corporation provided that its trustees should be chosen for a period of three years, and that other officers should be appointed as the by-laws provide. No by-laws were adopted, or, at least, none appear in the record; but it was shown that "by the uniform practice" of the corporation its treasurer had been chosen at regular triennial elections "for the ensuing term of three years." Under these circumstances it was held that the bond given [61] by the treasurer under his first appointment, though not containing any express time limit to its operation, was not a continuing obligation, and did not bind the surety for defalcations occurring after the expiration of the first term of three years. The same construction is placed upon Amherst Bank v. Root, 2 Met. 522, in Welch v. Seymour, 28 Conn. 387, Chelmsford Co. v. Demarest, 7 Gray, 1, and First Nat. Bank v. Briggs, 69 Vt. 12, 60 Am. St. Rep. 922, 37 Atl. 231, 37 L. R. A. 845. The case of Exeter Bank v. Rogers, 7 N. H. 21, is somewhat less in point than the Root case. While, under the peculiar circumstances there disclosed, the bond was held to continue through a long series of years, the opinion appears, impliedly at least, to except from the rule there approved cases of the character of the one before us. It says that "when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment." As the cashier in the present case, though holding at the will of the directors, nevertheless held by an "appointment limited to a certain term," it would seem to follow that his bond given upon such appointment is not within the rule of the New Hampshire precedent.

Of the other cases cited by the appellee in this connection, we will speak only of Westervelt v. Mohrenstecher, 76 Fed. 118, 22 C. C. A. 93, 34 L. R. A. 477, which was an action upon the bond of the cashier of a national bank. It was there decided that the annual re-election of the cashier did not operate to terminate the obligation of his bond given at the time of his first appointment. This holding was based

in part upon the act of Congress which makes the duration of service of bank officers indefinite and subject to be terminated at the will of the directors, and in part upon the peculiar language of the bond, which was expressly conditioned for the faithful performance of [62] duty by the cashier "for and during all time he shall hold the office of cashier of the said bank." This, it will be noted, is a much broader and more sweeping obligation than is expressed in the bond in suit. It may also be said, with reference to the last-cited case, that it seems, in argument, to carry the idea of the continued obligation of the surety upon such bonds beyond the limit expressed in any of the other precedents called to our attention. In an action upon a similar bond the Vermont court carefully reviews the authorities and reaches the opposite conclusion. Speaking of the annual election of an officer who is subject to removal or displacement at the will of the appointing power, the opinion well says: "The provision that an officer may be dismissed at pleasure can apply as well to an appointment limited to a given time as to an appointment to an indefinite period. It does not impliedly prohibit the fixing of a time beyond which the appointment shall not extend. Its effect is simply that the appointment, however made, shall be terminated at the pleasure of the appointing power. An appointment may be made which, if not previously terminated by the action of the board of directors, will continue for the period designated and expire by its own limitation. There is nothing in the statute which requires us to hold that this surety contracted with reference to an unlimited period when the appointment was in terms for a specified time. The cashier's re-election was something more than a meaningless expression of the pleasure of the directors; it was the filling of a vacancy occasioned by the limitation of their previous appointment."

It is difficult to avoid the force and justice of this reasoning. It finds support also in the following cases: O'Brien v. Murphy, 175 Mass. 255, 78 Am. St. Rep. 487, 56 N. E. 283; Bigelow v. Bridge, 8 Mass. 275; Ulster Co. Sav. Inst. v. Ostrander, 163 N. Y. 430, 57 N. E. 627; Moss v. State, 10 Mo. 338, 47 Am. Dec. 116; Savings Bank v. Hunt, 72 [63] Mo. 597, 37 Am. Rep. 449; South Carolina Soc. v. Johnson, 1 McCord, 41, 10 Am. Dec. 644; Mutual Loan etc. Assn. v. Price, 16 Fla. 204, 26 Am. Rep. 703; Treasurer v. Mann, 34 Vt. 371, 80 Am. Dec. 688; Citizens' Loan Assn. v. Nugent, 40 N. J. L. 215, 29 Am.

Rep. 230; Wardens v. Bostwick, 5 Bos. & P. 175; Kilson v. Julian, 4 El. & Bl. 853; Liverpool W. Co. v. Atkinson, 6 East, 507; Arlington v. Merrick, 2 Saund. 403; Peppin v. Cooper, 2 Barn. & Ald. 431; Theobold on Principal and Surety, sec. 82; Manufacturers' etc. Co. v. Odd Fellows' Hall Assn., 48 Pa. St. 446; Curling v. Chalkeen, 3 Maule & S. 502.

Few, if any, of these cases are quite parallel in their facts with the one we are considering, but they amply sustain the rule, to which we adhere, that a cashier's bond which does not expressly limit the period of its operation must be read in connection with the terms of the appointment under which such cashier holds his office, and, if such appointment be for a definite period, the bond ceases to be effective upon the expiration of the term so designated. The reasoning upon which this rule is based seems to be sound, and the rule itself places an undue burden upon no one. He who is requested to become surety upon the bond of a neighbor or friend who has been made cashier of a bank under an appointment expiring in one year or other short period may willingly do so where he would very reasonably refuse to assume an obligation which might continue for a lifetime. Before assuming the obligation, the surety may reasonably inquire as to the time and terms of his principal's appointment, and rely upon the actions of the corporation in that respect. To hold otherwise is to set a trap for the unwary. Says Chancellor Kent: "It is a well-settled rule, both at law and in equity, that a surety is not bound beyond the present terms of his contract. This rule is founded upon the most cogent and salutary [64] principles of public policy and justice. In the complicated transactions of civil life the aid of one friend to another in the character of surety or bail becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes, then, excessively important to have the rule established that a surety is never to be implicated beyond his engagement."

Believing, as we do, that the engagement of the surety in this case must be measured by the terms of the appointment under which the cashier was serving at the date of the bond, we are constrained to hold that the appellants cannot be made liable for defalcations of Seidensticker occurring after his first re-election.

2. The plaintiff's itemized statement of the account of moneys alleged to have been converted by Seidensticker begins under date of April 24, 1894, and continues from day to day, or, at least, at very frequent intervals, until the close of his service as cashier in the year 1897. Indeed, there seems to have been little or no concealment of the fact that he was using moneys drawn from the bank, the items being from time to time charged to him on the books of the bank, and the account credited with occasional payments or deposits, and by notes given in settlement of his overdrafts. Under the rule which we have approved in the preceding paragraph of this opinion, the surety upon the bond in suit was not chargeable with liability for any of the alleged wrongful conversions or overdrafts of the cashier after his first re-election, on or about June 1, 1894. During this period of about five weeks the items charged against the cashier aggregate a comparatively small sum. On the other hand, during the time the account set up by the plaintiff was accumulating, Seidensticker became entitled to be and is credited in said itemized statement with considerable sums of money for wages earned and for payments and deposits [65] made, which, if applied to the extinguishment of the claims against him according to priority of time in respect to the dates of their creation, much more than satisfy any demand which otherwise could be rightfully asserted upon the bond. That the payments and credits, in the absence of any agreement or direction for their application elsewhere, should be used for the satisfaction of those items or claims which are earliest in point of time, see Allen v. Brown, 39 Iowa, 330, and the numerous authorities cited in volume 2 of American and English Encyclopedia of Law, second edition, 462. Such application being made, and the surety's liability being limited to the term or period for which the cashier was first elected, there is confessedly nothing upon which to base a recovery by the plaintiff.

This conclusion renders it unnecessary for us to enter upon a consideration of the many other interesting questions which have been argued by counsel.

For the reasons stated, the judgment of the district court is reversed.

The Liability of Sureties on the Bond of an officer after the expiration of his term of office is the subject of a monographic note to Blades v. Dewey, 103 Am. St. Rep. 932-941; and the liability of sureties on successive bonds is the subject of a monographic note to Crawn v. Commonwealth, 10 Am. St. Rep. 843-860.

ELLIOTT v. CAPITAL CITY STATE BANK.

[128 Iowa, 275, 103 N. W. 777.]

BANKS AND BANKING—Ordinary Deposits—Limitation of Actions.—An ordinary deposit of money in a bank for which a certificate is issued is not a loan thereof to the bank, and the statute of limitations will not commence to run against an action on such certificate until demand for payment has been made, and such demand need not be made within the period of limitation computed from the date of the deposit. (pp. 200, 201.)

Dale & Harbison, for the appellant.

Read & Read, for the appellee.

275 SHERWIN, C. J. The certificate sued on is as follows: "$1500.00. Des Moines, Iowa, March 23, 1885. Capital City Bank. Mary J. Penrose has deposited in this bank fifteen hundred dollars, payable to the order of herself on the return of this certificate properly indorsed with four per cent interest, per annum. A. W. Naylor, President. No. 15108." The demurrer was sustained on the ground that the cause of action was barred by the statute of limitations, and the correctness of the ruling is the only question for determination.

The trial court evidently sustained the demurrer on 276 the authority of Mereness v. First Nat. Bank, 112 Iowa, 11, 84 Am. St. Rep. 318, 83 N. W. 711, 51 L. R. A. 410; and under the rule there announced its decision was right. The decision in the Mereness case, however, was planted on the ground that a general deposit of money in a bank is a loan of the money to the bank, and that an ordinary certificate of deposit is nothing more or less than a promissory note, to be governed, with certain exceptions, by the rules governing such notes. If it be true that a deposit in the usual course of business is a loan to the bank of the money deposited, then it may consistently be said that a certificate representing such loan is a promissory note; but the fundamental error in the Mereness case, and in the cases on which it was based, was the holding that an ordinary deposit of money in a bank is a loan thereof to the bank: See Lowry v. Polk County, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; Long v. Emsley, 57 Iowa, 11, 10 N. W. 280. In the later cases of Officer v. Officer, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947, and Hunt v. Hopley, 120 Iowa, 695, 95 N. W. 205, we distinctly held that an ordinary deposit is not a loan to the bank, and in the latter

case we expressly overruled Lowry v. Polk County, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049, in so far as it so held. With this conclusion and the arguments on which it is based in these cases, we are content, believing it to be sound and in accord with the great weight of authority. The conclusion in the Mereness case having been predicated on false premises, it follows that it must fall with its foundation, unless there be some other sufficient reason for holding that a demand certificate of deposit should be treated as a demand promissory note, so far as the statute of limitations is involved. We do not believe that any sound reason for so holding exists. It is undoubtedly true that such certificates have many of the incidents of promissory notes, and that they are often classed as such, but it is equally as true that a certificate of deposit represents a transaction entirely different from that represented by a note. A promissory note ordinarily represents a loan or its equivalent, and it is generally the duty of the debtor to seek the [277] creditor and pay him, and it was for the protection of the debtor that demand notes were originally held to be due at once. Deposits are made in a bank in accordance with the universal commercial usage, which becomes a part of the law of the transaction. They are neither loans nor bailments in the strict sense of the term. A deposit is a transaction peculiar to the banking business, and one that the courts should recognize and deal with according to commercial usage and understanding. The primary purpose of a general deposit is to protect the fund, and some of the incidental purposes thereof are the conveniences of checking and transacting large business interests without keeping and handling large sums of money. The transaction is in reality for the benefit and convenience of the depositor, and while the relation of debtor and creditor exists, and the bank has the use of the money for commercial gain, it assumes no further obligation than to pay the amount received when it shall be demanded at its banking-house: Girard Bank v. Bank of Penn Township, 39 Pa. St. 92, 80 Am. Dec. 507.

A bank may receive or decline deposits, and do business with whom it pleases. It may receive a general deposit today, and to-morrow, for reasons of its own, it may return the amount deposited, and refuse absolutely to transact business further with such depositor: See 5 Cyc. and cases cited. But unless the banker desires to return the deposit, he is under no obligation to seek his creditor for the purpose of

making payment. If no actual demand be necessary to mature the debt created by a deposit, then depositors may sue at once upon leaving the bank, and a transaction intended to be for the mutual benefit of both may become one of oppression and wrong to the bank, and this the law should not tolerate. That a certificate of deposit is distinguishable from a demand promissory note, we think clear: Morse on Banks and Banking, 3d ed., sec. 298; Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186; In re Hunt, 141 Mass. 515, 6 N. E. 554; Murphy v. [278] Pacific Bank, 130 Cal. 542, 62 Pac. 1059; Bellows Falls Bank v. Rutland Co. Bank, 40 Vt. 377; Officer v. Officer, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947; Hunt v. Hopley, 120 Iowa, 695, 95 N. W. 205. And that it is not due and payable until actual demand is made we think is held by the overwhelming weight of authority: Morse on Banks and Banking, 3d ed., sec. 301; Merchants' Nat. Bank v. State Bank, 10 Wall. 604, 19 L. ed. 1008, followed by the same court in later cases; Cottle v. Marine Bank, 166 N. Y. 53, 59 N. E. 736, and New York cases therein cited; Dickinson v. Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12; Miller v. Western Nat. Bank, 172 Pa. St. 197, 33 Atl. 684; McGough v. Jamison, 107 Pa. St. 336; Girard Bank v. Bank of Pennsylvania Tp., 39 Pa. St. 92, 80 Am. Dec. 507; Braham v. Adkins, 77 Ill. 263; Long v. Straus, 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123, 7 N. E. 763; Bellows Falls Bank v. Rutland Co. Bank, 40 Vt. 377; Tobin v. McKinney, 15 S. Dak. 257, 91 Am. St. Rep. 694, 88 N. W. 572; Citizens' Bank v. Fromholz, 64 Neb. 284, 89 N. W. 775.

The decisions of many of the other states are to the same effect, but we need cite no further authority on the proposition. Furthermore, the certificate in issue provides that it is payable on presentation properly indorsed, and its express language repels the thought that it is payable otherwise than on actual demand: Morse on Banks and Banking, sec. 302; McGough v. Jamison, 107 Pa. St. 336; Cottle v. Marine Bank, 166 N. Y. 53, 59 N. E. 736; Girard Bank v. Bank of Penn. Tp., 39 Pa. St. 92, 80 Am. Dec. 507. And the principle is also analogous to that of a bill payable on or after sight, which is not due until it is presented and payment demanded: 3 Randolph on Commercial Paper, 1608.

We think there is no merit in the appellee's contention that, if an actual demand is necessary to mature the certificate, such demand must be made within the period of the statute

of limitations. The parties may contract as they will. The depositor having the right to demand the amount due him at any time, and the bank having the right to pay [270] at any time, there can be no extension of the statute of limitations by either party, nor any laches on the part of either.

The demurrer should be overruled, and the case is reversed.

The Questions Involved in the Principal Case will be found discussed in the monographic note to Hillsinger v. Georgia R. R. Bank, 75 Am. St. Rep. 50; and in the subsequent cases of Mereness v. First Nat. Bank, 112 Iowa, 11, 84 Am. St. Rep. 318; Tobin v. McKinney, 15 S. Dak. 257, 91 Am. St. Rep. 694.

McCORKELL v. HERRON.

[128 Iowa, 324, 103 N. W. 988.]

GOVERNMENT HOMESTEADS—Exemptions.—One who makes a homestead entry on government land and then commutes his entry and pays to the United States government the minimum price for the land, and obtains a patent therefor, does not thereby abandon his homestead and convert such entry into a pre-emption. The homestead thus acquired is exempt from execution sale the same as though the homesteader had resided upon the land and cultivated it for the statutory period. (pp. 203, 204.)

ESTOPPEL BY DEED.—Recitals in Patents to Government Lands do not operate as an estoppel against the grantee and in favor of a stranger to the title. Erroneous recitals in such patents are not binding on the grantees therein. (pp. 204, 205.)

GOVERNMENT HOMESTEADS—Exemptions—Abandonment. A homestead acquired by entry on government land is forever exempt from liability for debts of the grantee, contracted prior to the acquisition of the homestead, and there can be no such abandonment of the homestead as will destroy such exemption. This is true, although the patentee conveys the land and afterward reacquires the title. (pp. 205, 206.)

Gallagher & Graham, for the appellants.

Erickson & Stickney and Zinc & Roseberry, for the appellee.

[325] SHERWIN, C. J. Sections 2289 and 2290 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, pp. 1388, 1389) provide for the entry of public lands for homestead purposes, and the mode of procedure necessary to make the entry. Under section 2291 of the statute (U. S. Comp. Stats. 1901, p. 1390), the entryman is not entitled to a final certificate [326] or patent until the expiration of five

years from the date of his entry, and only then upon proof that he has resided upon and cultivated the land for the term of five years immediately succeeding the time of making the affidavit required by section 2290. Section 2292 (page 1398) provides that "no lands acquired under the provisions of this chapter shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," and section 2301 (page 1406) is in the following language: "Sec. 2301. Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine, from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights." It was under the last section that the plaintiff commuted his homestead entry, and the appellants contend that by so doing he abandoned his homestead right, and elected to and did acquire title as a pre-emptor, under the provisions of the pre-emption statute, and that the exemption provided by section 2296 cannot be applied to the title so acquired.

The exemptions of the statute apply only to lands acquired under the provisions of the chapter relating to homesteads, and, of course, if the plaintiff's title was not so acquired, he cannot avail himself of the statute. At the time of the entry in question the laws of the United States also provided for the pre-emption of public lands, and the same person was entitled to pre-empt and homestead, but he could exercise either right but once. Under the homestead law three things must be done in order to constitute an entry on public lands: The application must first make an affidavit setting forth the facts which entitle him to make such entry; he must make formal application; and, third, he must pay [327] the fee required. When these requisites are complied with, and the certificate of entry is executed and delivered to him, the land is entered: Hastings etc. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. Rep. 112, 33 L. ed. 363. And thereafter, although a patent has not issued, he has an inchoate title to the land, which is property; and if he complies with the other conditions of the law, he becomes invested with full and absolute right to a patent, which, when issued, relates back to the date of the settlement: Nelson v. Northern Pac.

R. Co., 188 U. S. 108, 23 Sup. Ct. Rep. 302, 47 L. ed. 406; Red River etc. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229. Actual settlement, cultivation and improvement were also necessary conditions for an entry under the pre-emption law. Section 2301, it will be observed, provided that the settler might pay the minimum price for the land so entered at any time before the expiration of the five years, and receive patent therefor, "as in other cases directed by law." Reading only so much of the section, and construing it only in connection with the provisions of the pre-emption statute, it would be difficult to reach any other conclusion than that it, in effect, provided for an abandonment of rights under the homestead law, and an election by the settler to avail himself of the benefits of the law granting pre-emption rights, for the preliminary requisites were practically the same in both cases. But the section should receive a broader interpretation, and be construed in the light of the entire homestead statute, and with its purpose and intent clearly in mind. The concluding sentence of the section says that a patent shall "issue on making proof of settlement and cultivation as provided by law granting pre-emption rights." This language, to some extent, at least, indicates a purpose to treat the payment provided for in the section as in lieu of the further time and labor required to perfect the title, and not as an exercise of the pre-emption right.

The purpose and policy of the homestead act were to encourage the settlement and improvement of the public
328 lands. And the purpose of the exemption of such lands from sale for antecedent debts was for the benefit of the settler and his family; and it is a well-settled rule that all exemption laws are to be literally construed. The language of the exemption section is very broad. It says that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor"; and if it can fairly be said that one who commutes his homestead entry has so acquired his land, it must be given effect. The decisions on this point are not numerous, and, as the question involves the construction of the land laws of the United States, we may properly look to the construction placed thereon by its officers. The land department held as early as 1868 that a person who commuted under the homestead act could thereafter take a pre-emption, and that the com-

mutation merely consummated his homestead right, and was not a pre-emption: In re Brittin (decided in 1886), 4 Land. Dec. Dep. Int. 441; Cotton v. Struthers (Oct., 1887), 6 Land. Dec. Dep. Int. 288; In re Hewit (June, 1889), 8 Land. Dec. Dep. Int. 566. These decisions, while not binding on the courts, are entitled to consideration as showing the construction given to the act by the department officers: Hastings etc. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. Rep. 112, 33 L. ed. 363. Furthermore, the construction placed on the act by Congress itself is very material. The pre-emption law was repealed by act of March 3, 1891, chapter 561 of 26 Statutes, 1095, except sections relating to school lands and to county seats of justice; and by the same act Congress amended section 2301 by providing that commutations should only be made after the expiration of fourteen calendar months from the date of the entry, leaving the section in all other respects as it was before. This was a construction of the act by Congress which should not be disregarded, and which indicates quite clearly that a commutation of a homestead entry was not intended to be an abandonment thereof, and a pre-emption instead. [329] It is said, however, that the commutation might be made under the act of April 24, 1820, chapter 51 of 3 Statutes, 566, providing for the sale of the public domain. There can be nothing in this contention, however, because, if it was intended to make the commutation a purchase under that act, the law would not have required proof of settlement and cultivation as provided by law granting pre-emption rights. Relying to some extent on the decisions of the land department, the same conclusion was reached in the following cases: Johnson v. Bridal Veil Lumbering Co., 24 Or. 182, 33 Pac. 528; Clark v. Bayley, 5 Or. 343. And such is also the holding in Lewton v. Hower, 18 Fla. 872, and in Baldwin v. Boyd, 18 Neb. 444, 25 N. W. 580. In Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475, relied upon by the appellants, it was held that a commutation under section 2301 created a new title by pre-emption, and that an action in ejectment could be maintained thereon, notwithstanding an adjudication under the homestead claim prior thereto. We think the construction that we give to the statute is in accord with its spirit and intent, and in accord with the exemption laws of this state.

The patent issued to the plaintiff recited that full payment had been made according to the provisions of the act of April

24, 1820, and that the tract was purchased by Joseph McCorkel. The patent was put in evidence by the plaintiff, and the appellants contend that its recitals are conclusive on the appellee as an estoppel. Whatever the rule applicable to a controversy between the grantor and grantee, it is manifest that a stranger to the title cannot object to a disclosure of the real facts: Devlin on Deeds, 2d ed., secs. 996, 1278, 1279; Hart v. Meredith, 27 Tex. Civ. App. 271, 65 S. W. 507; Underhill on Evidence, sec. 207; Jones on Real Property, sec. 256; Lawless v. Stamp, 108 Iowa, 601, 79 S. W. 365. Moreover, if the patent erroneously recited the facts under which the conveyance was made, it was without authority, [330] and would not be binding. Land officers are merely agents of the law, and they have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the law and the conditions which it prescribed: Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

It is also argued that the recording of the patent in Plymouth county estopped the plaintiff from now asserting that its recitals are not correct. As to this point, it is sufficient to say that such an estoppel was not pleaded.

After the appellee had paid for the land, but before he had received a patent therefor, he conveyed it, and, as we understand the record, surrendered the possession thereof to the purchaser. This conveyance was afterward decreed to be fraudulent, and was set aside. The appellants urge that the conveyance and surrender of possession constituted such an abandonment of the homestead as destroyed the exemption under the United States law. Under the statutes of this state, a valid sale, accompanied by possession, would undoubtedly be an abandonment. But the homestead law of the United States does not contemplate an actual occupancy of the land after the title has vested in the patentee. On the contrary, it provides, by implication, at least, that it need not be so occupied for a longer period than five years, and not even for that length of time if commutation be made; and, as we have seen, section 2296 provides that no lands acquired under the act shall in any event become liable for antecedent debts. If this language be given its full force and meaning, a homestead is forever exempt from liability for the debts of the patentee contracted before the patent issued. Congress had the undoubted right and power to dis-

pose of the public lands as it saw fit, and to place such limitations on its grant as seemed just and wise. It had the absolute right to say that lands acquired under the homestead law should always be beyond the reach of the class of creditors [331] named, whether the lands were occupied by the patentee or not; and this is true, because no state or individual could be injured by such limitation. And in our judgment, such was the intent of the broad language of the act. It has also been so construed in Brandhoefer v. Bain, 45 Neb. 781, 64 N. W. 213, and in Van Doren v. Miller, 14 S. Dak. 264, 85 N. W. 187.

On the whole case, we are satisfied that the judgment below was right, and it is affirmed.

A Homestead in Public Lands, claimed and perfected under the United States statutes is exempt from liability for debts contracted prior to the issuing of the patent therefor: Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836; De Laney v. Knapp, 111 Cal. 165, 52 Am. St. Rep. 160; Weber v. Laidler, 26 Wash. 144, 90 Am. St. Rep. 726.

BARNGROVER v. PETTIGREW.

[128 Iowa, 533, 104 N. W. 904.]

CONTRACTS to Procure Divorce—Public Policy.—Any agreement conditioned on the obtainment of divorce, or intended or calculated to facilitate its obtainment, is void. (p. 207.)

CHAMPERTY.—Agreement to prosecute a suit for divorce and pay witnesses' fees in a stated sum is champertous and void. (p. 207.)

CONTRACT Against Public Policy—Recovery on Quantum Meruit.—The law will not imply a promise to pay for services which are in derogation of public policy, and if the plaintiff cannot establish his cause of action without relying on an illegal contract, or on services which by their very nature contravene public policy, he cannot recover on a quantum meruit. (p. 208.)

Action of the plaintiffs, who were respectively an attorney and a detective, to recover compensation for services rendered in a suit for divorce brought against defendant by his wife. Prior to the institution of this suit, the plaintiffs, learning that it was about to be brought, entered into an agreement with him as follows:

"The first party has employed second party to prepare evidence in, and try in the district court of Union county, Iowa, for first party, the suit entitled Jessie Pettigrew v. J.

S. Pettigrew, in which said first party is defendant; and said second party undertakes to furnish proof, in the trial of said cause, of the plaintiff's infidelity to first party, and to secure him a divorce from his wife on his cross-petition to be filed in said suit; and as compensation for said services, first party agrees to pay second party as follows: Twenty-five dollars cash, the receipt of which is hereby acknowledged, and then, when second party is successful in securing him a divorce from his wife on his cross-petition, or in case first party shall compromise said suit, or do any other act or thing to prevent second party from accomplishing said end, the further sum of $1,000. Said sums to be in full compensation for their services; and in case of the failure of said Barngrover and Hughes to obtain said divorce, except by reason of some act or thing done hereafter by the said Pettigrew, then the said second party will be entitled to receive only the sum of $25 in hand paid; and it is further agreed that, in case the $1,000 is paid by first party to second party, then said second party will pay defendant's witness fees in said case, or depositions taken by him."

The plaintiffs sought to recover both on the contract and on a quantum meruit, alleging that the action between the defendant and his wife had been compromised, and she allowed to secure a divorce without opposition. The trial judge directed a verdict for the defendant at the close of the plaintiff's evidence.

J. E. Barngrover, for the appellants.

T. L. Maxwell and D. W. Higbee, for the appellee.

535 SHERWIN, C. J. The clearly expressed object of the agreement was to bring about a dissolution of the marriage contract and to put an end to the various duties and obligations resulting from it. It is therefore against sound public policy and void. The marriage relation is sacred, and one which the law will encourage and maintain when formed. Its dissolution will not be left to the caprice of the parties themselves, nor will it be permitted to rest on the interference of strangers. Hence, any agreement conditioned on the obtainment of divorce or intended or calculated to facilitate its obtainment is void. Such is the settled policy of the law as expressed in the universal rule adopted by the courts: 9 Cyc. 519, and cases cited; 15 Am. & Eng. Ency. of Law, 956, and cases cited; Stokes v. Anderson, 118 Ind. 53, 21

N. E. 331, 4 L. R. A. 313; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746.

The agreement also provides that the appellants shall pay the defendant's witnesses out of the one thousand dollars so received, and is champertous: Boardman v. Thompson, 25 Iowa, 487; Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484.

The appellants contend that, if the agreement be held to be invalid, they are still entitled to recover the reasonable value of their services on a quantum meruit. But the law will not imply a promise to pay for services which are in derogation of public policy any more than it will enforce a specific contract having that object in view; and when a plaintiff cannot establish his cause of action without relying on an illegal contract, or on services which by their very nature contravene public policy, he cannot recover: Pangborn v. Westlake, 36 Iowa, 546; Reynolds v. Nichols & Co., 12 Iowa, 398; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. Rep. 884, 36 L. ed. 759; Pollock's Principles of Contracts, 253-260. In the light of this well-settled rule, it is manifest that there can be no recovery here on a quantum meruit; for the services rendered, as shown by the record, were along the line specified in the written agreement. The appellants cite many cases wherein recovery on a quantum meruit was allowed [536] where the contract was found to be illegal. In many of the cases champertous contracts were involved, and in all the services actually rendered were not in themselves illegal; while in the case at bar, as we have seen, the services rendered were in themselves illegal, because their object was to procure a divorce for the defendant.

The judgment of the district court was clearly right, and it is affirmed.

The Validity of Contracts Between Attorney and Client is discussed in the monographic note to Shirk v. Neible, 83 Am. St. Rep. 159-187; and champerty and maintenance are discussed in the note to Thainheimer v. Brickerhoff, 15 Am. Dec. 317-322. It has been held that an attorney contracting for a contingent fee has the burden to prove that the contract is fair to the client: Lynde v. Lynde, 64 N. J. Eq. 736, 97 Am. St. Rep. 693. And a contract between an attorney and a layman, providing that the latter shall procure the employment of the former by third persons for the prosecution of suits to be commenced, and shall assist in looking after and procuring witnesses to be used in such suits, in consideration of a share of the attorney's fees collected therein, has been held opposed to public policy and void: Langdon v. Conlin, 67 Neb. 243, 108 Am. St. Rep. 643. The validity of contracts to furnish evidence is the subject of a note to Wood v. Casserleigh, 97 Am. St. Rep. 145-151.

FIRST NATIONAL BANK v. BRUBAKER.

[128 Iowa, 587, 105 N. W. 116.]

FRAUDULENT CONVEYANCES — Parent and Child.—A conveyance of land from a son to his parents for the honest purpose of satisfying an indebtedness to them, is valid and not in fraud of his other creditors. (p. 211.)

FRAUDULENT CONVEYANCES—Partnership Property—Insolvency.—A conveyance of partnership property in satisfaction of the debt of an individual partner, if made in good faith, is valid against other firm creditors, even though the firm or the individual partner was insolvent at the time of the conveyance. (p. 212.)

PARTNERSHIP—Sale and Division of Firm Property.—Partners may, during the partnership, convert partnership property into separate property, or separate into partnership property, and such property will, upon dissolution of the firm, be held to possess that character which is thus impressed upon it. Or one partner may purchase the interest of all his copartners in the firm property, and thereafter the creditors of the firm can claim no preference over the individual creditors of the purchaser in the application of the property to the payment of debts. (p. 213.)

PARTNERSHIP—Sale and Division of Firm Property.—A sale by each partner in a firm, acting separately and on his own terms, of his interest in the firm property constitutes a division thereof, and the validity of the transfer does not depend upon the consent of the remaining member or members of the firm. (pp. 213, 214.)

Henderson & Henderson, for the appellant.

O. C. Brown, for the appellees.

588 WEAVER, J. On or about March 1, 1902, the defendant, C. D. Brubaker, and one Alexander entered into partnership as retail merchants. Brubaker had very little capital, and his father and mother, who are codefendants herein, advanced or loaned to him about eighteen hundred dollars with which to begin business. In August following the firm property was sold to Nuzom Bros. For some reason, not clearly indicated, the partners did not unite in the deal with the purchasers, but conducted separate negotiations, Alexander selling his half or partnership interest to one of the Nuzoms, and Brubaker selling his interest to the other, each making such terms and receiving his pay in such money or property as was satisfactory to himself. In making this deal, C. D. Brubaker was assisted by his father, and the transaction took the form of an exchange of properties, the Brubakers transferring to Nuzom the half interest in the partnership property, together with a house and lot

owned by the elder Brubaker and occupied by him as a homestead, in consideration of which Nuzom undertook to give title to the other party to a forty-acre tract of land owned by him in that vicinity, transfer a small stock of goods then held in a neighboring town, and to pay in addition to the property here mentioned the sum of six hundred and sixty-five dollars in money. In closing this exchange, the cash payment and the conveyance of the land were, with the consent or at the direction of C. D. Brubaker, made to his parents in alleged payment of the loan made to him when he entered business.

The tracts of real estate entering into the exchange were both encumbered by mortgage, and the parents are not shown to have received from the transactions money or property materially in excess of the debt due them from their son. [589] The small stock of goods referred to was subsequently levied upon and sold for the benefit of the plaintiff herein as a creditor of the firm of Alexander & Brubaker. When the firm went out of business, it was indebted to the plaintiff in a considerable sum and had outstanding obligations, most or all of which were taken up by said bank or paid by checks drawn upon it by said Alexander for the firm, thus accumulating an overdraft. Suit was afterward brought upon the indebtedness thus incurred and judgment obtained, on which, after allowing all proper credits, there is still an unpaid balance of several hundred dollars. C. D. Brubaker proving to be insolvent, this action was brought in equity to subject the forty-acre tract above mentioned as having been conveyed to the parents to the payment of the plaintiff's judgment. The theory of the plaintiff is that C. D. Brubaker's interest in the partnership property and business was first liable to the payment of partnership debts, and that the transfer or payment to D. Brubaker and S. I. Brubaker of a part of the proceeds of the sale of said property was fraudulent. The trial court, after hearing all the evidence, found for the defendants and dismissed the plaintiff's bill, and from this judgment the plaintiff appeals. In our view the right of the plaintiff to the relief demanded rests wholly upon the question whether the allegation of fraud is fairly established by the record. A careful reading of the testimony leads us to agree with the conclusion reached by the trial court.

1. There is nothing shown which would justify us in saying that the parents of C. D. Brubaker, in receiving the

money and property in payment of their debt, were actuated by any purpose to hinder or delay, or to assist their son in hindering or delaying, the partnership creditors in the collection of their claims. It may well be that they were dissatisfied with the outlook for the success of their son in the partnership business, and were anxious to avoid loss by having him pay or secure the debt due to them. That a creditor may lawfully receive pay or [590] take security from his debtor, even though he knows, or ought to know, that the result of such transaction will be to delay or defeat other creditors, is well settled: Carson v. Byers, 67 Iowa, 606, 25 N. W. 826; Stroff v. Swafford, 81 Iowa, 695, 47 N. W. 1023; Aulman v. Aulman, 71 Iowa, 124, 60 Am. Rep. 783, 32 N. W. 240. If, however, the creditor colludes with the debtor and takes the property of the latter for the purpose of hindering or delaying, or assisting him in delaying or defrauding his creditors, then, of course, it is an elementary proposition of equity that the fraudulent sale will be set aside. In the instant case there is no attempt to show that the judgment defendant was not in fact indebted to his father and mother in the full amount claimed, or that the property transferred in payment of the debt was in excess of the sum justly due to them. It is true that transactions of this nature between members of the same family, one of whom is insolvent or in failing circumstances, will be closely scrutinized, and, if the taint of fraud be found or is fairly to be inferred, they will not be upheld. The right of a person to receive pay or security from a debtor is in no manner lessened or restricted because the debtor is a relative or member of his family. The fact of relationship is a material matter, to be considered upon the question of good faith of the person receiving the property; but if no fraud in fact be found, neither law nor equity discriminates against him. We are satisfied that the parents of the judgment defendant took the conveyance of the land for the honest purpose of securing their own claim, and not for the purpose of defrauding or delaying the other creditors of their son.

2. The proposition most insisted upon by the appellant is that the partnership property and assets are first liable for the payment of partnership debts, and that the use of such property or assets by a partner for the payment of his individual debt is fraudulent as a matter of law, and that the creditor of the individual partner, receiving payment in such manner, may be required to account for the money or property so

obtained. [591] Stated in counsel's own words, the claim is that "a creditor of one member of a firm who takes partnership property or the proceeds thereof in payment of his individual debt, knowing that the property is partnership property, must account for the same or its value to a creditor of the partnership." In our judgment this position is not tenable. Notwithstanding the somewhat ill-considered language found in a few decisions, it is not true, in this state at least, that the creditors of a firm have some sort of a lien on partnership property, or that payment of the debt of an individual partner from the partnership assets, even though made without actual bad faith, will be set aside as fraudulent at the suit of a partnership creditor. It may be conceded that, when a court of equity has acquired jurisdiction of a partnership for the purpose of winding up its business, partnership property will be applied to the payment of partnership debts, and creditors of the individual partners can reach only the surplus which may remain after partnership creditors have been paid in full; but until equity does obtain jurisdiction, the right to insist that partnership property shall be applied primarily to the discharge of partnership debts is one belonging solely to the several partners themselves, and is not available to the creditors of the firm: Poole v. Seney, 66 Iowa, 502, 24 N. W. 27; Smith v. Smith, 87 Iowa, 93, 43 Am. St. Rep. 359, 54 N. W. 73; Hawk Eye Woolen Mills v. Conkling, 26 Iowa, 422; Maquoketa v. Willey, 35 Iowa, 330; George v. Wamsley, 64 Iowa, 178, 20 N. W. 1; Sylvester v. Henrich, 93 Iowa, 489, 61 N. W. 942; Johnston v. Robuck, 104 Iowa, 523, 73 N. W. 1062.

Nor, under our holdings, does the fact that the firm or an individual member of the firm is insolvent give rise to any different rule, so long as the payment or security of the individual debt is taken in good faith. This rule is not recognized by all courts, but we have repeatedly affirmed it, and believe it in accord with sound principle and the weight of authority. In Smith v. Smith, 87 Iowa, 93, 43 Am. St. Rep. 359, 54 N. W. 73, the partnership and both of its individual members were insolvent, yet a mortgage of the firm property to secure an antecedent debt to the [592] father of the partners was upheld against the creditors of the firm, it appearing from the evidence that the father's claim was just, and that he acted in good faith in taking the security. This decision was arrived at after two hearings and very thorough argu-

ment by counsel, and no persuasive reason is now advanced why we should depart from it.

Counsel say, however, that the application of the rule affirmed in that case depends upon the consent of all the partners to the payment of the individual indebtedness from the assets of the firm, and that in the case at bar Alexander did not consent to the act of C. D. Brubaker in causing the land to be deeded to his father. Conceding the law to be as stated, it does not appear to be applicable to this case. In the proper sense of the word, the property conveyed by Nuzom to D. Brubaker constituted no part of the assets of the firm. It is elementary that partners may, during the partnership, convert joint or partnership property into separate property or separate into joint, and the property will, on dissolution, be held to possess that character which is thus impressed upon it: Bissett on Partnership, 198-111; Gow on Partnership, 296; Story on Partnership, 527; City of Maquoketa v. Willey, 35 Iowa, 323. See, also, cases in 22 Am. & Eng. Ency. of Law, 2d ed., p. 188, note 5. One partner may purchase the interest of all his copartners in firm property, and thereafter the creditors of the firm can claim no preference over the individual creditors of the purchaser in the application of the property to the payment of debts: Carver etc. Co. v. Bannon, 85 Tenn. 712, 4 Am. St. Rep. 803, 4 S. W. 831; Ladd v. Griswold, 4 Gilm. 25, 46 Am. Dec. 443; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Dimon v. Hazard, 32 N. Y. 65.

It is not denied that by mutual consent, or at least without protest or objection on part of either Brubaker or Alexander, these partners, acting separately and individually, sold their several shares or interest in the firm property to different purchasers, each fixing his own price and making his own [593] terms of sale. There is no suggestion that either partner ever claimed or asserted any right or interest in the proceeds of the sale made by the other, or attempted to exercise any dominion or control over it as partnership property. These circumstances, construed in the light of the subsequent conduct of all parties concerned, afford ample ground for holding that by the consent of the parties their interests in the joint property were disunited, and that each held the proceeds of his individual sale as his separate and individual property. Such being the case, the consent of Alexander to the conveyance of the land by Nuzom to D. Brubaker in payment of the debt due from C. D. Brubaker was not essential to the

validity of the transaction. In his testimony given on the trial in the court below, Alexander denies that he knew of the conveyance of the land to D. Brubaker, but does not claim there was any promise or agreement with his partner by which the property and money received upon the sale of their respective shares was to be held and treated as partnership assets. On the contrary, his conduct with reference to the sale, as well as his testimony on the witness-stand, is explainable on the theory that he, as well as C. D. Brubaker, regarded their rights and interests in the partnership property as severed and the proceeds of several sales as the individual property of the partners. The right to insist that partnership property be retained and applied first to partnership debts is, under the rule of our cases already cited, a right to be asserted by the partner, and not by creditors. Whatever equities to this end the creditors may have are dependent upon the equities between the partners and must be worked out through them: Kimball v. Thompson, 13 Met. 283; Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Ladd v. Griswold, 4 Gilm. 25, 46 Am. Dec. 443; Coover's Appeal, 29 Pa. St. 9, 70 Am. Dec. 149.

Alexander is not a party to this proceeding, and, if he were, the showing made excludes the idea that he has any [594] equitable right to have the property in controversy subjected to the payment of the plaintiff's judgment.

For the reasons stated, the decree appealed from is affirmed.

The Right of a Partnership or the members thereof to apply the funds or property of the firm to the payment of the individual debts of the partners, to the prejudice of creditors of the firm, is not entirely free from doubt. The question will be found discussed in Jackson Bank v. Durfey, 72 Miss. 971, 48 Am. St. Rep. 596; Smith v. Smith, 87 Iowa, 93, 43 Am. St. Rep. 359, and monographic note thereto.

BOYD v. BOYD.

[28 Iowa, 699, 104 N. W. 798.]

IDEMS SONANS—Constructive Notice.—One who takes a mortgage on land, in the name of the owner as shown by the record title cannot be charged with constructive notice of a judgment against the mortgagor under a different name, although the pronunciation of both names—the one being "Sheffey" and the other "Cheffey"—may be the same. In such case the mortgage is the paramount lien. (pp. 216, 217.)

LIENS—Priority—Burden of Proof.—If a judgment creditor alleges priority of his judgment lien over that of a mortgage, and that the mortgagee had actual knowledge of the judgment, the burden of proof is on the judgment creditor to show that the mortgagee had such knowledge. (p. 217.)

PRINCIPAL AND AGENT.—Although a mortgagee agrees to rely on an abstract of title prepared by the agent of the mortgagor, this does not make him the agent of the mortgagee also, so as to charge the latter with the agents' uncommunicated knowledge of defects in the title. (pp. 217, 218.)

Davis & Orvis, for the appellant.

L. McMillan, for the appellee.

700 BISHOP, J. John Sheffey, or Cheffey, was an illiterate negro living in Mahaska county, with his wife, Ellen, likewise illiterate. In February, 1900, the defendant C. M. Downs obtained a money judgment against them under the name of "Sheffey" in the district court of Mahaska county. Subsequent to the rendition of said judgment the said negro, under the name of John Cheffey, became possessed of the title to the certain real estate in question, situate in said Mahaska county, and which title was made a matter of record. The mortgage here sought to be foreclosed was executed by John Cheffey and Ellen Cheffey, his wife, and bears date June 5, 1902. It was made a matter of record June 27, 1902. In August, 1902, Downs sued out an execution on his judgment, and the property in question was levied upon by the sheriff as the property of John Sheffey or Cheffey, and it was thus sold at execution sale, Downs becoming the purchaser. September 28, 1903, a sheriff's deed was executed and delivered to Downs, and therein the judgment debtor is described as "John Sheffey, or Cheffey," and 701 said deed was duly made a matter of record. John Sheffey, or Cheffey, having died, the defendant Joseph Boyd was appointed administrator of his estate on February 5, 1904.

This action was commenced February 8, 1904, and C. M. Downs was made a party defendant, the allegation as against him being that he has an interest in the real estate, but which is inferior to the lien of the mortgage, and the prayer is that it may be so adjudged, and for foreclosure. There was judgment and decree by default against Joseph Boyd, administrator. Downs appeared and filed answer, among other things asserting that John Sheffey and John Cheffey was one and the same person, and setting up his judgment, execution sale, and deed, and his absolute title to the property thereunder. It is also alleged that plaintiff had actual and constructive notice of his (defendant's) judgment and that the same was a lien on the property at the time the mortgage now sued upon was taken and accepted. Said defendant prays that his title may be quieted accordingly.

A brief statement of the evidence will be sufficient. The old negro employed Liston McMillan, Esq., counsel for plaintiff in the instant action, to procure for him a loan on the property. McMillan applied to plaintiff, and the latter, although having no knowledge of Cheffey, consented, provided his mortgage should be a first lien on the property. McMillan assured him that he should have a first lien and agreed to prepare the abstract himself. Upon going to the records, he found the title in the name of John Cheffey, with no liens or judgments under that name. He then prepared the note and mortgage in suit, and had the same executed by Cheffey and wife, each signing by a cross, and they were delivered with the abstract to plaintiff, who, in turn, paid the amount of the loan to McMillan. The latter paid out the money as directed by Cheffey. It is certain that plaintiff had no personal knowledge of the Downs judgment. McMillan made no search of the records for judgments against "Sheffey"; but whether he knew otherwise of the 702 existence of the judgment in favor of Downs at the time he received the money from plaintiff for Cheffey is the subject of considerable dispute in the evidence.

1. It is not contended by appellant that where a judgment debtor takes title to real estate in a name other than his own, and hence other than the name designated in the judgment, and afterward mortgages the property to an innocent third person, the judgment is the paramount lien. It seems to be their thought that, as "Sheffey" and "Cheffey" are or may be pronounced alike, the instant case should be ruled by the

doctrine of idem sonans. But this cannot be. Whatever might be said in a case presenting a fact situation different from that we have before us, it must be true here that the matter of pronunciation is of little, if any, consequence. The inquiry into the state of the records proceeded from a name recorded as the title holder. The matter of spelling, then, became the important thing, because the records do not speak otherwise. And it cannot be said in reason that the name "Cheffey" appearing as title-holder would of itself constitute a warning signal to look out for judgments under the name of "Sheffey." This being true, the situation is governed by the general rule, too well known to the profession to require the citation of authorities, to the effect that in matters of title one may rely upon the public records as written. Of course, we do not mean to hold that, where the initial letters are the same, the doctrine of idem sonans may not be relied on to overcome a difference in spelling, where the pronunciation is substantially the same. Conceding, then, that Boyd was bound by the records, and might not rely upon the abstract furnished him as a full and faithful disclosure of the matters appearing upon such records, still it must be said that as to him the record was clear, and that the filing of his mortgage gave to him paramount title. As bearing on the subject, see Howe v. Thayer, 49 Iowa, 154; Thomas v. Desney, 57 Iowa, 58, 10 N. W. 315; Huber v. Bossart, 70 Iowa, 703 718, 29 N. W. 608; Heil v. Lauer's Appeal, 40 Pa. St. 453, 80 Am. Dec. 590.

2. But counsel for appellant say that the burden was upon plaintiff to show that he did not have actual knowledge of the existence of the judgment and that the same constituted a prior lien upon the property. There is no merit in this contention. To establish the supremacy of his judgment, Downs came in and asserted actual knowledge thereof on the part of plaintiff. Under a familiar rule, it was for him to prove it.

3. A further contention on behalf of appellant is that McMillan had knowledge respecting the judgment, and that, as in the matter of the preparation of the abstract he was acting as the agent of Boyd, the latter became chargeable with the knowledge possessed by him. This position is wholly untenable. We need not stop to determine the fact as to what, if any, knowledge was possessed by McMillan. It is true, as shown by the testimony of McMillan, that Boyd consented

to rely upon his representation as to the condition of the title. But that did not make him the agent of Boyd. McMillan was acting for Cheffey, and the effect of the situation was no more than if Boyd had said to Cheffey: "I will take your word for it that the abstract you offer me shows perfect title." No authority is required to support this conclusion.

This disposes of the several contentions made by appellant, and, finding no error, the decree is affirmed.

The Doctrine of Idem Sonans is the subject of an extended note to Thornily v. Prentice, 100 Am. St. Rep. 322-354.

The Effect of the Defective Recording of legal instruments upon the rights of third persons is the subject of a monographic note to Koch v. West, 96 Am. St. Rep. 397.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

SANDERS v. COMMONWEALTH.

[117 Ky. 1, 77 S. W. 358.]

CONSTITUTIONAL LAW—Sale of Milk from Cows Fed on Still Slop.—A statute forbidding the sale of milk from cows fed on "still slop, brewers' slop, or brewers' grains," is a valid police regulation. (p. 224.)

Norton L. Goldsmith, Alfred Seligman and Gibson, Marshall & Gibson, for the appellant.

Warwick Miller and C. J. Pratt, attorney general, for the appellee.

[3] BURNAM, C. J. The appellant, Fred Sanders, was indicted, tried and convicted in the Jefferson circuit court for having knowingly sold milk from animals fed upon "still slop," in violation of the provisions of section 1274 of the Kentucky Statutes of 1899, which reads as follows: "Whoever shall knowingly sell, or cause to be sold, to any person in this state, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or sell milk commonly known as 'skimmed milk,' with intent [4] to defraud, or shall knowingly sell any milk, the product of a diseased animal, or from animals fed upon 'still slop,' 'brewers' slop,' or 'brewers' grains,' or shall knowingly use any poisonous or deleterious material or milk from animals diseased or fed as aforesaid, in the manufacture of butter or cheese, shall be fined in any sum not less than twenty-five nor more than two hundred dollars." A reversal of the judgment of the circuit court is asked upon the ground that so much of the statute as prohibited the sale of milk

from animals fed upon still slop is obnoxious to the fourteenth amendment to the constitution of the United States, which provides, in section 1, that "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant's contention is based upon the claim that still slop, when used under proper conditions, is a wholesome and innocuous food for dairy cows, and that the milk from cows fed thereon is a pure and wholesome article of food for human beings. Our attention is called to the fact that there is nothing in the statute, nor in the indictment which is the foundation of this prosecution, which negatives either of these contentions, and that no testimony was introduced by the commonwealth upon the trial of the case for the purpose of establishing that such was the fact; that the whole proceeding rests upon the naked prohibition contained in the statute itself. The section upon which the prosecution is based is one of the provisions of the statute aimed at offenses against the public health, and was exercised under the police power of the state for the protection of the health of its citizens. No exact definition of [5] the extent of this power has or perhaps can be given. Judge Cooley, in his work on Constitutional Limitations, has approved that given by Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. 53, as the most satisfactory and complete to which his attention has been called. It is as follows: "All property in this commonwealth is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other usual and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. The power is vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of

the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and source of this power than to mark its boundaries and limit its exercise. And this power, under the American constitutional system, is left with the individual states. It cannot be taken away from them, either wholly or in part": See United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593. "Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of the national sovereignty, obstruct or impede the exercise of any authority which the [6] constitution has confided to the nation, or deprive any citizen of the rights guaranteed by the federal constitution": See Cooley on Constitutional Limitations, 7th ed., 831, and authorities there cited.

The fourteenth amendment of the federal constitution was first called to the attention of the supreme court of the United States in the Slaughter-house Cases, 16 Wall. 36, 21 L. ed. 394. In construing a statute of Louisiana vesting in the slaughter-house company the sole and exclusive privilege of conducting a livestock landing and slaughter-house business, and requiring that all animals should be landed at the stock landing and slaughtered at the slaughter-house of the company, and nowhere else, it was held that the statute did not conflict with the provisions of the fourteenth amendment. The scope of this amendment, in so far as it relates to the question before us, has been very clearly stated by Judge Cooley as follows: "The guaranteed equal protection is not to be understood to require that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is deemed to be equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds. It cannot be a mere arbitrary selection": Cooley's Constitutional Law. And the text is supported by numerous adjudged cases.

It is a canon of statutory construction that every presumption must be indulged in favor of the validity of the statute, as the constitution confers upon the General Assembly the

law-making power. But notwithstanding this general presumption, the courts must obey the constitution, [7] and determine in a particular case whether its limits have been passed. As was said in Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60: "To what purpose are powers limited, and to what purpose is that limitation committed in writing, if these limits may at any time be passed by those intended to be restrained? If, therefore, a statute purporting to have been enacted to protect the public health is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the constitution": See Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205. In Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 32 L. ed. 253, it was held that the fourteenth amendment to the constitution was not designed to interfere with the exercise of the police power by the state for the protection of health, prevention of fraud, or the preservation of the public morals, and that it was competent for the state of Pennsylvania to prohibit the manufacture of oleomargarine butter. In that case the defendant offered to prove that he made large profits from the sale of the prohibited article, and that it was a wholesome and innocuous food; that the statute upon which the prosecution was founded was not a lawful exercise of the police power, because it deprived him of the lawful use of his property without compensation. The court sustained an objection to the evidence, and the defendant was adjudged to pay a fine and the cost of the prosecution. The judgment was affirmed by the supreme court of Pennsylvania: Powell v. Commonwealth, 114 Pa. St. 165, 60 Am. Rep. 350, 7 Atl. 913. Upon appeal to the supreme court of the United States, the question was whether the prohibition of the sale and manufacture of oleomargarine—a wholesome article of food—was a lawful exercise by the state of the power to protect by [8] police regulations the public health. In discussing this question, the court, through Judge Harlan, said: "As it does not appear from the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of the question is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will embodied in statutes as they may happen to approve or

disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large. Both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds, other than those produced from unadulterated milk, or cream from unadulterated milk, ... will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling unwholesome oleomargarine as an article of food, their appeal must be to the legislature or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping the powers committed to another department of the government."

[9] In State v. Layton, 160 Mo. 474, 83 Am. St. Rep. 487, 61 S. W. 171, the supreme court of Missouri had before it an act of the General Assembly prohibiting the sale of "alum baking powder," as unhealthy. In this case there was no question of deceit in the sale of the prohibited article. The statute upon which the prosecution was based embodied no idea of the imitation of a superior article, and the court said: "No baking-powder is recognized as the standard, as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld, if at all, upon the right of the legislature to make all needful laws to preserve the public health. While it is true that there are limits, under our system, to this power, we must start with the presumption in favor of the act. While we do not accede to the proposition that the legislature can arbitrarily declare any article of food in general use, and concededly wholesome and innocuous, to be unhealthy, and its production and sale a crime, and would have no hesitancy in declaring such an act void when the act on its face discloses its arbitrary and unreasonable character, ... if it be an article so universally conceded to be wholesome and innocuous that the court could take

judicial notice of the fact, the legislature has no right to prohibit its sale. But if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. The act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubts'': Citing Cooley's Constitutional Limitations, 6th ed., and numerous opinions.

It was decided in the case of Maryland v. Broadbelt, 89 Md. 565, 73 Am. St. Rep. 201, 43 Atl. 771, 45 L. R. A. 435, that the legislature could, ''under the police power,'' [10] require the registration with ''the livestock sanitary board'' of all herds of cattle of persons selling milk for food, and prohibit the sale of milk from premises found in an unsanitary condition.

The development in the science of bacteriology in recent years has conclusively proven that the microbe is a most potent agent in the propagation of contagious diseases, and that there is no more favorable element for their absorption, growth and development than milk, and that milk contaminated by their presence communicates diphtheria, typhoid fever, tuberculosis and other kindred contagious diseases to human beings, especially to the young. And it is a matter of common knowledge that the conditions usually prevailing around places where ''still slop'' is produced are also highly favorable to the development of many forms of bacilli. The heat, dampness and fermentation—all essential elements in the production of still slop—are favorable to germ growth. So that we may fairly assume that the General Assembly, in the enactment of this statute, had sufficient information to justify the belief that milk from cows fed on still slop had ample opportunity to become impregnated with elements dangerous to the public health. Nearly every police regulation affects to some extent property rights, and, whilst this power cannot be made the excuse for oppressive and unjust legislation, the courts are not permitted to say that the legislature may not enact laws apparently necessary for the public health. We have reached the conclusion that, under the facts of this case, this court has no power to hold that the General Assembly did not have, under the ''police power,'' authority to enact the statute under which appellant was convicted.

Judgment affirmed.

A Statute Prescribing certain sanitary regulations to be observed by dairymen and others who supply milk to cities and towns is upheld as constitutional in State v. Broadbelt, 89 Md. 565, 73 Am. St. Rep. 201. For other authorities discussing the validity of legislative regulations of the sale of milk, see City of St. Louis v. Liessing, 190 Mo. 464, 109 Am. St. Rep. 774, and cases cited in the cross-reference note thereto.

LOUISVILLE GAS COMPANY v. KENTUCKY HEATING COMPANY.

[117 Ky. 71, 77 S. W. 368.]

NATURAL GAS—Right to Use and Waste.—Every owner of land may bore for gas on his own ground, and make any reasonable use of it, but he may not deliberately waste the supply for the purpose of injuring his neighbor, or wantonly destroy or injure their common reservoir. (p. 228.)

Humphrey, Burnett & Humphrey, J. S. Wortham, F. M. Sackett and Alexander G. Barrett, for the appellants.

Matt O'Doherty, Edward L. McDonald and J. W. Lewis, for the appellee.

[73] HOBSON, J. There is a natural gas field in Meade county, from which the gas is piped to Louisville by the Kentucky Heating Company, and there sold for heating and illuminating purposes. The Louisville Gas Company claimed the exclusive privilege of selling illuminating gas in the city of Louisville. There was a long litigation between it and the Kentucky Heating Company, resulting in a judgment of this court on June 20, 1901, that the heating company has the right to sell natural gas for heating and illuminating purposes, [74] also the right to make and sell artificial gas for fuel, but not the right to sell artificial gas alone or in mixture with natural gas for purposes of illumination without violation of the gas company's exclusive privilege: Kentucky Heating Co. v. Louisville Gas Co., 23 Ky. Law Rep. 730, 63 S. W. 751. On September 3, 1901, or about three months after this judgment was rendered, the Calor Oil and Gas Company was incorporated. Its capital stock was fixed at one thousand dollars, divided into one hundred shares of ten dollars each. John A. Gray, Harry Wirgman and W. A. Jones were the incorporators, subscribing for the entire stock of the company; but neither of them paid anything therefor, or really owned the stock. They subscribed for it for A. Hite Barrett, the

chief engineer of the Louisville Gas Company, Udolpho Sneed, the president of the gas company, and Will Speed, the son of J. B. Speed, a stockholder in the gas company. The stock was paid for by A. Hite Barrett, Udolpho Sneed and J. B. Speed, who were the real organizers of the company. The articles of incorporation were drawn by a son in law of J. B. Speed, and he is now the president of the company. The money which was paid in for the stock was placed in bank to the credit of the company thus formed, and has since remained there. In the winter before this corporation was formed John H. Trent, a lawyer living in Meade county, who seems to have been in the employ of the gas company previous to that, began taking leases of land for gas in the gas field, and took quite a number. In doing this he acted, it appears, as the agent of Barrett, Sneed, and Speed, and after they organized the Calor Oil and Gas Company these leases were assigned to it. It is also shown that for some time before the organization of this company they had been considering the gas field in Meade [75] county, from which the Kentucky Heating Company obtained its gas, and one of their objects in getting the leases and organizing the Calor Oil and Gas Company was to interfere with the supply of that company, and thus cripple it as a rival of the Louisville Gas Company. They put up between them about ten thousand dollars, which they spent in Meade county in boring wells and in erecting what is called a "lamp black factory." In addition to this, when the depositions were taken they had incurred liabilities for about ten thousand dollars more, which were then unpaid. They succeeded in getting several good gas-wells, from which the gas was piped to their lamp black factory. When they began operations the Kentucky Heating Company had a gas pressure of something over sixty pounds. In five or six months this was run down to less than thirty. On these facts the chancellor, on the petition of the Kentucky Heating Company, enjoined the operation of the lamp black factory, on the ground that it was operated only to waste the gas, and thus destroy the Kentucky Heating Company. From this judgment the defendants appeal.

A close fence twelve feet high was built around the lamp black factory, and no one was admitted within the inclosure. It stood on a half acre of ground leased for that purpose, and no one was permitted to come on this half acre. Firearms were discharged there to deter the neighbors from coming

about. The structure was out in the country where such inclosures are unusual, and, as shown by the evidence, unnecessary. The man in charge of the factory was the lawyer Trent, who lived at the county seat, and knew nothing of the manufacture of lamp black. There were only two other persons employed—one, the day man, was a boy sixteen years old; the other, the [76] night man, somewhat older, but both entirely ignorant of the manufacture of lamp black. During the five months the factory was operated they manufactured about three hundred pounds of lamp black, worth four cents a pound. In this time they burned all the gas they could obtain, the total amount being about ninety million of feet. No lamp black was shipped away from the factory. The gas was burned night and day, and it is evident from the proof that in a short time more the pressure upon the pipes of the Kentucky Heating Company would have been so low as to destroy its usefulness. Other facts might be stated, but the testimony of the defendants themselves, whose depositions were taken by the plaintiff, is sufficient to show that they conceived the idea of securing leases on territory connected with the gas reservoir from which the Kentucky Heating Company obtained its supply, and by boring numerous wells to draw off the gas, and practically destroy the business of the Kentucky Heating Company. The organization of the Calor Oil and Gas Company and the establishment of the lamp black factory was a part of the plan to evade the statute against the wasting of natural gas and to waste the gas.

It is earnestly maintained that the statute does not apply to the case, and that at common law there is no remedy. We cannot concur in this conclusion. Independently of the statute, the common law affords an ample remedy for a wrong like this. While natural gas is not subject to absolute ownership, the owner of the soil must, in dealing with it, use his own property with due regard to the rights of his neighbor. He cannot be allowed deliberately to waste the supply for the purpose of injuring his neighbor. While a bad motive will not [77] render that unlawful which is lawful (Chambers v. Baldwin, 91 Ky. 121, 34 Am. St. Rep. 165, 12 Ky. Law Rep. 699, 15 S. W. 57, 11 L. R. A. 545), a man is only allowed to make a reasonable use of those natural supplies which are for the common benefit of all. The gas under the ground may go wherever it will, but the defendants cannot be allowed to draw off the gas from under the plaintiff's lands simply

for the purpose of injuring it, for the plaintiff's lands are thus clandestinely sapped, and their value impaired. These principles have often been applied in the case of underground waters, and we see no reason why the same rule should not apply to natural gas: Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Greenleaf v. Francis, 18 Pick. 117; Walker v. Cronin, 107 Mass. 562; Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Bassett v. Salisbury Co., 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276. In 21 American and English Encyclopedia of Law, second edition, page 417, it is said: "Though gas is a mineral, the decisions governing ordinary minerals apply to it only with many qualifications, and it is governed by rules analogous to those governing water percolating beneath the surface. Water, oil, and still more strongly, gas, may be classed by themselves, and have been not inaptly termed minerals ferae naturae": See, also, to same effect, 2 Snyder on Mines, sec. 1171. The doctrine that an act which is legal in itself, and violates no legal right, cannot be made actionable on account of the motive which induced it, has no application, because the acts of the defendants in wasting the gas violated the plaintiff's legal rights. Both the parties drew gas from the same reservoir. It was incumbent on each to exercise his right so as not to injure the [78] other unnecessarily. If one wasted all of the gas from the reservoir, there would be nothing left for the other. Every owner may bore for gas on his own ground, and may make a reasonable use of it; but he may not wantonly injure or destroy the reservoir common to him and his neighbor. This principle has been often applied. Thus each riparian owner may make a reasonable use of a lake or stream of water flowing through his land, but he cannot make an unreasonable use of it. Every traveler may make a reasonable use of a highway, but not an unreasonable use to the detriment of another. No one may make an unreasonable use of the atmosphere. In all these instances the party aggrieved by the unreasonable use may maintain an action for redress. In the case before us the plaintiff and the defendant have each the right to take gas from the common source of supply, but neither may by waste destroy the rights of the other; and, as in the case of other like wrongs, the action for redress may be brought in the name of the real party in interest: Manufacturing Gas Co. v. Indiana Gas Co., 155

Ind. 461, 57 N. E. 912, 50 L. R. A. 768; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, and cases cited. We therefore conclude that the circuit court properly granted the injunction complained of, and the judgment in that action is affirmed.

W. C. McGehee, who leased the land on which the wells referred to, or part of them, were situated, filed also an action to cancel the lease, on the ground that it was obtained by fraud. McGehee had leased other lands to the Kentucky Heating Company, and was getting seven hundred dollars per year from the Kentucky Heating Company therefor. He told Trent this when the latter applied for the lease in question, stating that he did not want to do anything that would injure [79] the Kentucky Heating Company. Trent thereupon said to him that the people he represented were law-abiding men, and that they would do a lawful business. The proof warrants the conclusion that the wasting of the gas and the consequent injury to the Kentucky Heating Company was a motive inducing the defendants to get the leases, and this purpose was in view when they obtained the lease. McGehee would not have leased them the land if he had understood the facts. The chancellor canceled the lease on the ground that it was obtained by fraud and that fraud vitiates any contract obtained thereby. The defendants have spent something like twenty thousand dollars in putting down their wells, perfecting their rights, and erecting their buildings and other structures. This will be a total loss to them if their lease is canceled. As has been recently held in the case of Commonwealth v. Trent, it is incumbent on them to confine the gas in the wells until such time as it may be utilized, and, if they fail to do this, they become liable to the penalties denounced by the statute. It cannot be presumed that the defendants will willfully violate the statute. When McGehee leased them the ground, he intended them to have the benefit of the gas, if they found any, and intended them to use the gas. If, notwithstanding the statute, they should hereafter use the gas unlawfully, he or any other person aggrieved may maintain an action for the protection of his rights. Under the circumstances, and in view of all the facts, the court concludes that a rescission of the lease should not be decreed

The judgment in the action of W. C. McGehee against the Calor Oil and Gas Company is reversed, and cause remanded, with directions to dismiss the petition.

A Land Owner has No Right, maliciously or wantonly, to waste percolating waters to the injury of his neighbors: See Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365; Stillwater Water Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541; monographic note to Katz v. Walkinshaw, 99 Am. St. Rep. 71. The supreme court of Wisconsin however, seems to have fallen into error on this question: Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933. Practically the same rule, it would seem, should govern the waste of natural gas as the waste of percolating waters. In fact, statutes have been enacted in at least one state making it unlawful to waste natural gas: See the monographic note to Booth v. People, 78 Am. St. Rep. 256.

DIEBOLD v. KENTUCKY TRACTION COMPANY.

[117 Ky. 146, 77 S. W. 674.]

RAILWAYS—Trunk Lines—Franchise.—An electric railroad company authorized to carry freight and passengers between two cities in different states and all intermediate points is a "trunk railway," within the meaning of a constitutional provision that municipalities shall not grant franchises to street railways and other enumerated corporations, except to the highest and best bidder, but that such provisions "shall not apply to a trunk railway." (pp. 233, 234.)

RAILWAYS—Definition of "Trunk Railway."—A "trunk railway" is a commercial railway whose main line, whether operated by steam, electricity or any other motive power, connects towns, cities, counties or other points within the state or in different states, and has the legal capacity, under its charter or the general law, of constructing, purchasing and operating branch lines or feeders connecting with its main stem or trunk, the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river to its tributaries. (p. 238.)

C. H. Shield, for the appellant.

Helm, Bruce & Helm, W. B. Thomas, D. W. Sanders and J. G. Sachs, for the appellee.

147 BARKER, J. The appellant, John Diebold, is a citizen of Louisville, Kentucky, and owns real property fronting on Sixteenth street, which 148 is one of the highways of that city. The appellee, the Kentucky Traction Company of Louisville, is a railroad corporation organized under the general statutes of Kentucky, having power and authority, under its charter, to construct and operate an electric line from Louisville, Kentucky, to Nashville, Tennessee, and to be a common carrier of both passengers and freight, when in operation. As a necessary prerequisite to the building of the proposed line, appellee secured from general council of the city of Louisville

an ordinance granting to it a right of way from a point on its southern boundary, along and over parts of certain named streets and alleys to Center and Jefferson streets. One of the highways over which the franchise granted by the municipality extends is that part of Sixteenth street upon which appellant's property fronts. Conceiving that the franchise granted to appellee was void as being violative of the provisions of section 164 of the constitution, which requires that all franchises included within its language be sold to the highest bidder, appellant instituted this action for an injunction to prohibit the building of the proposed line along Sixteenth street in front of his property.

The pleading in this case aptly raises the one question involved in the record, whether or not the proposed road is a trunk railroad within the meaning of section 164. If it is, appellant has no cause of action; if it is not, the injunction prayed for should have been awarded. Trunk railroads are specially excepted from the provisions of section 164. The opinion of the learned chancellor below fully meets our views upon the question for adjudication, and it is adopted as the opinion of the court, and is as follows: To decide the questions of law which arise on this motion, two sections of the constitution of Kentucky have to be considered, to wit, [149] sections 163 and 164. Section 163 is as follows: "No street railway, gas, water, steam heating, telephone or electric light company within a city or town shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus, along, over or across the streets, alleys or public grounds of a city or town without the consent of the proper legislative bodies or boards of such cities or towns being first obtained; but when charters have been heretofore granted conferring such rights and work in good faith had begun thereunder, the provisions of this section shall not apply." Section 164: "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto for a term exceeding twenty years. Before granting such franchises or privilege for a term of years such municipality shall first after due advertisement receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

The question to be decided sharply on this motion is whether the appellee, having its termini in Louisville and Nashville, under its original and amended charter, is a street railway, and therefore within the constitutional prohibition against such a grant as that contained in the ordinance referred to, or a trunk railway, and thereby expressly excluded by section 164 from the prohibitory operation of the two sections of the state constitution above quoted. Whether a railway is a street railway or a trunk railway, it will not be contended, we apprehend, depends on the motor power employed by it in propelling its rolling stock over and along its tracks. It certainly can make no difference [150] whether the cars of a railway company are propelled by the agency of steam, or gasoline, or of electricity, compressed air, liquefied air, or any other agency which science and the inventive genius of man may in the future bring into use. Rather the character of a railroad company is determined by the nature and extent and limits put upon its operation by law or otherwise, and by the character and object of its corporate creation as shown by its charter. By the original charter of the Louisville and Nashville Railroad, it was authorized and empowered to lay its tracks and propel its cars thereon between Louisville and Nashville, and was authorized and empowered, just as the appellee in this case is authorized and empowered, to transport passengers, freight and express matter to all immediate points, towns, cities and counties between Louisville and Nashville, and to erect its depots to accomplish its corporate purposes, just as the appellee here is authorized and empowered to do. The only difference in character, legal or otherwise, between the appellee and the Louisville and Nashville Railroad, under its charter, is that one has steam for a motor power, and the other has electricity; both are interurban and interstate railroad corporations. It is difficult to understand what the phrase "a trunk railway" clearly means, if it does not mean an interurban and an interstate railway for commercial purposes.

Appellant insists that appellee is a street railway within the meaning of section 163 of the state constitution, above quoted. It will be observed at a glance that the framers of section 163 of the state constitution intended that the restricted character of the street railway, as a strictly local intramural street-car company, should be understood as such by the classification and association of the street railway

referred to in that section with gas companies, water companies, [151] steam-heating companies, telephone companies, and electric light companies, all of which are strictly intramural and essentially and exclusively local, in their scope and operation in cities, towns and other municipalities. The fact that a railroad company, whether operated by electricity or steam, such as the Chesapeake and Ohio Railroad Company, the Illinois Central Railroad Company, the Louisville and Nashville Railroad Company, or an interurban or interstate railroad company, all having the same corporate purposes, and performing the same important public functions for the convenience and good of the public, in transporting passengers, freight and express matter, for the advancement of commerce between towns and cities within a state, or between towns and cities within separate states, is obliged, in order to accomplish the corporate purposes of its creation, to have terminal points, a passenger or freight depots, to reach which it is necessary to lay its tracks along the streets within a city or town, does not make such railroad company a street railway, and impress upon it a local, intramural character, such as is possessed by gas, water, steam heating and electric light companies, enumerated in section 163 of the state constitution, above quoted. If a railroad company, whether operated by steam or electricity as a motor power, which lays its tracks and connects in commercial relationship different towns, cities, counties and other municipalities within a state, or cities of different states, be not a trunk railway, then it is difficult to understand what a trunk railway is. We have examined all the recognized authorities upon railroads and railways, and have been unable to find in any text-book or decision the phrase "trunk railway," or anything that approaches the same. In Elizabeth etc. [152] R. R. v. Ashland etc. St. Ry. Co., 96 Ky. 347, 26 S. W. 181, the court said: "It is urged, however, that the appellee [the street railway company] is not a railroad company in the meaning of the section of the constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use steam, horse or other propelling power on said road in the transportation of freight and passengers."

In the case under consideration the appellee was organized under the general railroad laws of this state, just as a rail-

road corporation extending its line from the city of Louisville to any distant point in the state of Kentucky, or to any city or point in a distant state (assuming that the foreign states accorded the right or privilege to the Kentucky corporation in or across their territory), would have to be organized. And unless the agency of propulsion adopted by a railroad determines its legal character as a street railway or a railroad trunk line, it is impossible to conceive of any distinction between the two. It seems to us that it is the charter of a company which places it in the class to which it belongs, whether street railway or trunk railway, and not the character of the motor power which it employs. If, in order to be a trunk railway, the railroad company must have a main line, with branches or feeders branching off from the main stem to adjacent towns, cities or counties, then the record in this case shows that the defendant electric railroad corporation meets this requirement, because it has branches to Owensboro, Russellville, and other points off from its main line between Louisville and Nashville. We think there can be no [153] doubt that, giving the phrase "a trunk railway" a rational interpretation, it means, and can mean nothing else but, a commercial railway or railroad connecting different cities within a state, and facilitating commerce between them, or between cities in different states. And to such commercial railroads, of course, it is not pretended that section 163 of the state constitution applies. The term "street railway," as used in section 163 of the state constitution, means, and can only mean, applying to it a common-sense interpretation, those street railroads which, before the introduction of electricity, used mules and horses as motor power for drawing the street-cars over its street-car tracks, for the use and convenience of the local public in a municipality—those street-cars that run along the streets of a city, picking up passengers here and there, and putting them off at street crossings, and at the termini of the street-car companies' tracks within the municipality. They were created and organized and operated, and such was their character, as defined in their charters, strictly and exclusively for the local convenience of those persons or passengers whose pleasure or business prompted them to go from point to point within the city. They were never organized or intended for commercial purposes between different cities within a state, or between different cities in different states. In the case of Louisville

etc. R. R. Co. v. Louisville City Ry. Co., 2 Duvall, 175, Judge Robertson, after holding that the amended charter of a railroad company was as efficient in establishing its character as its original charter, said: "A railroad is for the use of the universal public in the transportation of all persons, baggage and other freight. A street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only, [154] and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad. And we presume that, in this contradistinctive sense, the term 'railroad' was used in the appellant's charter, as amended in 1860. A railroad and a street railroad are, in both their technical and popular import, as distinct and different as a road and a street, or as a bridge and a railroad bridge, and it has been adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation."

Lewis, in his work on Eminent Domain, volume 1, section 110a, says: "Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, and the methods of operating and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: 1. Commercial railroads; 2. Street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, or between one place and another. They are usually not constructed upon the public streets or highways, except for short distances. Street railroads embrace all such as are constructed and are operated in the public streets, for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street."

In the cases of Zehren v. Milwaukee Electric Ry. Co., 99 Wis. 83, 67 Am. St. Rep. 844, 74 N. W. 538, 41 L. R. A. 575, the court said: "A street railway in its inception is a [155] purely urban institution. It is intended to facilitate travel in and about the city from one part of the municipality to another, and thus relieve the sidewalk of foot-passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly a city conveyance, for the use of the

city, by people living or stopping therein, and fully under the control of the municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of a street railway remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of improving the street and rather as a help to the street than as a burden thereon."

The learned court, after speaking of the introduction of the new motor power, and the enlargement of street-cars and the extension of distances, for their operation, even connecting separated cities and villages, said: "Thus the urban railway has developed into the interurban railway, and threatens soon to develop (as in the case at bar) into the interstate railway. The small car which took up passengers at one corner and dropped them at another has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country, from one city to another, bearing its load of passengers, ticketed through with an occasional passenger picked up on the highways. The purely city purposes which the urban railway subserves have developed into and are being supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long distances and stretches of intervening country. It is built and operated mainly to obtain through [156] travel from city to city, and only incidentally to pick up a passenger in the country towns. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam road, and would not use the highway at all."

In the case of Street Ry. Co. v. Doyle, 88 Tenn. 747, 17 Am. St. Rep. 933, 13 S. W. 936, 9 L. R. A. 100, that distinguished and learned jurist, Judge Lurton, said: "The distinction between the use of the commercial railway and that by a horse railway is so wide and plain that it needs no further comment or illustration. Confessedly, the railway involved in this case (which was an electric railway) is on a line between the two, the equivalent of neither, but partaking largely of the nature of both." The electric railway, in the case Judge Lurton decided, transported passengers only, and this feature Judge Lurton lays emphasis on as distinguishing it from a commercial railway, which carries both passengers and

freight, receiving and discharging the same at regular depots or stations established for that purpose.

In the case of Malott v. Collinsville etc. Ry. Co., 108 Fed. 313, 47 C. C. A. 345, Judge Grosscup said: "It [referring to the Collinsville Electric Railway Company] was incorporated under the law of March 1, 1872 (Laws 1871-72, p. 625), relating to the incorporating of railroad companies. Its articles of incorporation are on file in the office of the Secretary of State of Illinois in the book of Railroad Records. It took, and unquestionably intended to take under its charter, the powers of a railroad corporation, and among them the railroad corporation right of eminent domain. The fact that its trains are to be operated by electricity instead of steam does not affect its place in [157] the laws of the state as a railroad company. There is nothing in the acts of 1872 (Laws 1871-72, p. 625) and 1889 (Laws 1889, p. 223) that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these acts that necessarily or fairly excludes its application to electrical roads as they now exist; indeed, these electrical roads, in the speed of their trains, in the distance traveled, and in their capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. We cannot conceive that these acts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purpose of general transportation; nor do their incidental functions as street railways, in the towns or cities traveled, lift them out of the railroad statute, for it has been held that an elevated road, while intramural in its creation and in its powers, is within the contemplation of the railroad statute, and exercises its right of eminent domain by virtue of these statutes: Lieberman v. Chicago etc. R. R. Co., 141 Ill. 140, 30 N. E. 544. Indeed, if appellee be not a railroad within the meaning of the act of March 1, 1872, as modified by the act of May 27, 1889, and other acts relating thereto, we can find no authority for its existence as a corporation, or for its exercise of the right of eminent domain. See, also, to the same effect, the very interesting and instructive case of Massachusetts Loan etc. Co. v. Hamilton, 88 Fed. 588, 32 C. C. A. 46; Williams v. City Electric St. Ry. Co. (C. C.), 41 Fed. 556;

Chicago R. R. Co. v. Milwaukee R. R. Co., 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856."

158 The foregoing authorities conclusively demonstrate that the defendant electric corporation is not a street railway within the meaning of sections 163 and 164 of the present constitution of Kentucky, but that it is an interurban and interstate commercial railroad, with all the incidental corporate rights and powers of railroad corporations in this state, whether operated by steam or electricity or any other motive power. After a very thorough examination of the authorities, both text-writers and decisions on railroads or railways, while the court has been unable to find a legal definition of the phrase "trunk railway" formulated in any precise words, it is believed that the following is the correct definition of the phrase: "A trunk railway is a commercial railway, whose main line, whether operated by steam, electricity, or any other motive power, connects towns, cities, counties or other points within the state or in different states, and which railroad company, under its charter, or under the general law, has the legal capacity of constructing, purchasing and operating branch lines or feeders connecting with its main stem or trunk the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river bears to its tributaries."

Under section 842a of Kentucky Statutes of 1903, it is provided that an interurban electric railroad company, in order to be under the same responsibilities, and to have the same rights, powers and privileges as railroad corporations existing under the laws of this commonwealth, must, under its charter, be authorized to construct a railroad ten or more miles in length. The statutory requisite must, of necessity, be incorporated into the above definition of a trunk railway when applied to interurban electric railroad companies in this state. No 159 reason can be suggested, and none in fact exists, why the phrase "trunk railway," found in section 164 of the state constitution, should be applied to steam railroad corporations, and not to electric railroad corporations, or to electric railroad companies, interurban or interstate. Manifestly, it is equally applicable to both. The phrases "trunk railway" and "main line," whether applied to steam railroad corporations or electric railroad corporations, are essentially synonymous, else both phrases are without meaning. It is a miscon-

ception of the general statutory railroad law of this state, as embodied in article 5, chapter 32 of the Kentucky Statutes, to suppose that the grant or regulation contained in the ordinance of the city, defining the streets along and over which the defendant company is authorized to run in order to reach its terminal depot at Green and Center streets of the city of Louisville, is a grant of a franchise or privilege to a street railway, which would be void unless duly advertised for public bids, and accordingly awarded to the highest and best bidder.

The defendant interurban electric railway company was created and organized, as we have seen, under the general statutory railroad laws of this state contained in article 5, chapter 32, of the Kentucky Statutes. It derives its corporate franchises, rights and powers from the state of Kentucky. It does not, and cannot, derive any of its corporate rights, franchises and powers from the city of Louisville. By subsection 5 of section 768 of article 5 of the Kentucky Statutes, it is provided that all railroad companies created under that act shall, among other things, have the power to construct its road upon or across any watercourse, private or plank road, highway, street, lane or alley, and across any railroad or canal; and, in case the road is constructed upon any street or alley, the same shall be upon such terms and conditions as shall be agreed upon between the corporation and 160 the authorities of any city in which the same may be. Thus it will be seen that the right of the defendant company to lay its tracks along the streets of the city of Louisville is granted by the legislature of Kentucky subject only to the provision—a most reasonable one—that the city shall have the power of regulating the mode or manner in which the defendant railroad corporation may or shall exercise its corporate franchises, privilege and right of constructing its road upon and along the streets of the city. The city of Louisville has exercised its supervisory power over the mode or manner in which the defendant railroad corporation should exercise its statutory corporate franchise of constructing its road upon and along the public streets of the city, by defining and prescribing the streets and the route along which the defendant may construct its railroad. This is all the city has done in the ordinance. It has granted to the defendant no franchise or privilege which it did not already possess under subsection 5, section 768, article 5, chapter 32, of the Kentucky Statutes. The city of Louisville, by said or-

dinance, has simply exercised its power of regulating the mode and manner in which the defendant corporation may exercise its franchise, derived from the state, of entering with its tracks within the limits of the city, and laying the same along the public streets, in order to reach its terminal depot in the city.

The judgment dismissing the petition is affirmed.

No Authorities defining "trunk lines" have come under our observation. There are a number of decisions, however, wherein the meaning of the words "railroads," "railways," and "street railways" is discussed: See Funk v. St. Paul City Ry. Co., 61 Minn. 435, 52 Am. St. Rep. 608; Bloxham v. Consumers' Elec. etc. R. R. Co., 36 Fla. 519, 51 Am. St. Rep. 44; Rafferty v. Central Traction Co., 147 Pa. St. 579, 30 Am. St. Rep. 763; Katzenberger v. Lawo, 90 Tenn. 235, 25 Am. St. Rep. 681; Zehren v. Milwaukee Elec. etc. Co., 99 Wis. 83, 67 Am. St. Rep. 844.

BOYD v. BOARD OF COUNCIL OF FRANKFORT.

[117 Ky. 199, 77 S. W. 669.]

CONSTITUTIONAL LAW—Building Permit—Arbitrary Power of City Council.—An ordinance declaring that if any person shall "erect any structure or building, within the city limits, without the consent of the common council," which will be "greatly injurious to adjacent property, and destroy the comfort, convenience, peace and reasonable enjoyment of adjacent residents, the same shall constitute a nuisance," and he shall be punished by fine, and the structure removed by the police at the cost of the owner, is unconstitutional as conferring arbitrary power upon the city council. (pp. 245, 246.)

NUISANCE—Negro Church.—The Common Council of a city cannot declare a church, which is being erected by a negro congregation, a nuisance, on the ground that worship therein will be noisy and disagreeable to neighboring residents. (p. 248.)

INJUNCTION Against Ordinance—Parties.—If an invalid city ordinance affects a large number of people, such as the congregation of a church, one of the members may prosecute a suit to enjoin its enforcement. (p. 248.)

Hazelrigg & Chenault, for the appellants.

Ira Julian, for the appellee.

202 SETTLE, J. This action was instituted and an injunction obtained by the appellants for the purpose of preventing the enforcement by the appellees, city of Frankfort, its officers and agents, of an alleged void ordinance, and in-

cidentally for the further purpose of restraining certain prosecutions then pending in the police court against the appellants, as well as others of a like kind with which they were threatened, all for alleged violations of the ordinance in question. It is, in substance, [203] averred in the petition; That the appellants are residents and citizens of the state of Kentucky and of the United States, and belong to the negro race. That they are trustees of the First (Colored) Baptist Church in the city of Frankfort, which church is a voluntary association, composed of a congregation of the negro race, whose purpose has been and is to engage in the worship of Almighty God according to the dictates of their own consciences. That there are several hundred members of this church, all having a common interest with the appellants, for which reason, and because of its being impracticable to make them all parties, the action was instituted by the appellants for themselves and the other members of the church, and also as trustees of and for the church. That the appellants are owners, as trustees of the First Baptist Church, of a certain lot of ground in the city of Frankfort situated on the northeast corner of Clinton and High streets, of which lot they became the owners for the purpose of erecting a church thereon for the use of the First (Colored) Baptist Church, which was and is to be of brick, with slate roof, and as nearly fireproof as practicable. That, after purchasing the necessary materials, and entering into the necessary contracts with certain persons for the erection of the church building, but before beginning its erection, the appellants, acting upon advice and according to custom, applied to the common council of the city of Frankfort for permission to erect their church building, but were arbitrarily and illegally refused the right to do so, and when appellants, through their contractors and employés, went upon the lot where the church building was to be erected, and were about to tear down an old building thereon preparatory to the erection of the church, and were engaged in the work of constructing the foundation therefor, the appellee city, through its mayor, [204] swore out a warrant of arrest for the appellants, its contractors and employés, which warrant, when issued by the police judge, was executed by a police officer of the appellee city by arresting the appellants and their workmen, and taking them before the police judge, who tried them under the warrant upon the charge of violating an alleged ordinance of the city which re-

quired them and all others to obtain a building permit before erecting any building in the city of Frankfort. It is further averred that after the trial of appellants and their workmen by the police judge, he, without then rendering his decision, took the case under advisement, but subsequently rendered a judgment to the effect that it was not a valid or enforceable ordinance; consequently the appellants and other defendants in that prosecution were held not guilty, and were therefore discharged. It also averred that during the time the police judge had the case mentioned under consideration, and before its decision by him, the following ordinance was enacted by the common council and approved by the mayor, viz.:

"An Ordinance to Provide for the Punishment of Persons Erecting or Maintaining Nuisances, and for the Removal of Same.

"Be it enacted by the Common Council of the City of Frankfort:

"Section 1. That if any person or persons shall proceed to erect any structure or building, within the city limits, without the consent of the common council, and said structure or building (where used for the purpose for which it is designed and intended) would be greatly injurious to adjacent property, and destroy the comfort, convenience, peace and reasonable enjoyment of life of adjacent residents, the same shall be deemed to be and constitute a nuisance, and they shall be punished by a fine not less than $5.00, nor more [205] than $20.00, and each day they may proceed with the erection of said structure or building, shall be deemed a separate offense, and upon conviction, it shall be the duty of the police officers to remove said structure, or any part thereof, at the expense of the owner.

"Section 2. This ordinance to take effect and be in force from and after its passage, and all ordinances or parts of ordinances in conflict herewith are hereby repealed."

The further averment is made in the petition that the appellants and their employés were, by the procurement of the appellees, again arrested under warrants issued by the same police judge, and served by the same police officers, upon the charge of violating the ordinance supra, because they were attempting to proceed with the work of erecting their church building, and upon being tried therefor they were fined five dollars each, and each adjudged to pay five dollars and eighty

cents costs; that they are threatened with further prosecutions from the same source and for the same cause, and, as the maximum fine prescribed by the ordinance is twenty dollars, which is less than an amount from which an appeal is allowable under the law, their only remedy is the writ of injunction. It is also averred by the appellants that the ordinance complained of was adopted by the common council of the appellee city pending the decision of the police judge in the cases arising out of the warrant first issued, and that it was adopted for the express purpose of preventing the appellants from erecting their church building, and solely because the church membership is composed of negroes; that by its enforcement the appellants and their fellow-church members are, and will be, deprived of the equal protection of the laws, and are being discriminated against in the enjoyment of their civil and religious rights under the constitution of the state and United States, and that the ordinance, if upheld, will deprive [206] them of their liberty and property and the use of the latter, without due process of law, and will deny them equal protection under the law, contrary to the fourteenth amendment of the constitution of the United States, and especially to the Bill of Rights, section 2 of the constitution of this state, wherein it is declared that "absolute and arbitrary power over the lives, liberty and property of freemen exist nowhere in a republic, not even in the largest majority." The additional averment is made in the petition that the ordinance in question is inadequate, uncertain of meaning and ambiguous; that it is likewise oppressive, unreasonable, arbitrary and void.

The appellee board of councilmen filed separate answer to the petition, in which they failed to deny the arrest and trial of the appellants set forth in the petition, or that they had been interfered with as alleged in the work of erecting their church building; nor do they deny that the ordinance complained of was adopted by them after the arrest and trial of appellants under the first warrant, and before the judgment of the police judge was rendered, acquitting them of the charge in that warrant. But the answer does deny all the averments of the petition in regard to the alleged purpose of the enactment of the ordinance, or that it is open to the constitutional or other objections urged against its validity by the appellants. It also denies that the refusal of the common council to grant appellants permission to erect the church was arbitrary, and

aver that the refusal was made in the exercise of a sound discretion, and because appellants did not have the written consent of a majority, or, in fact, of any, of the citizens and property owners residing within two hundred yards of the place of the proposed building to its erection, as required by an ordinance of the city; and, further, that the church proposed [207] to be erected by the appellants will constitute a nuisance, because the mode of worship practiced by its members is, and will be, so boisterous, loud and unseemly as to interfere with the peace and quietude of the citizens and property owners residing adjacent to the church. The answer also interposes the plea of res judicata, as it is therein averred that the same matters and issues involved in this action were litigated and tried in a previous suit between the same parties before a special judge, whose decision was adverse to the appellants, and the judgment in the alleged former action is pleaded in bar of this one. The appellees mayor, police judge, chief of police and city marshal also filed an answer to the petition, in which they adopted the averments of the answer of the board of councilmen, and in addition set out the facts with reference to the second arrest and trial of the appellants.

Demurrers were filed by the appellants to the answers, and each paragraph thereof, which were overruled by the lower court. Thereupon the appellants filed reply controverting the material averments of the answers. By mutual consent of the parties the evidence was all taken in the form of affidavits, and, the cause having been submitted upon the pleadings and affidavits, judgments was rendered by the lower court dismissing the petition, and allowing the appellees their costs, the temporary restraining order having theretofore been dissolved by the court on appellee's motion.

The case being before this court on the appeal, we will consider, first, the objection urged to the constitutionality of the ordinance by virtue of which it is contended by the appellees that the common council of the city of Frankfort had the right to refuse appellants permission to erect the church upon the lot owned by them. A careful reading of the ordinance will show that it fixes no standard by which the [208] action of the city council in granting or refusing its consent is to be controlled. The consent of the council can be given or withheld at its own arbitrary pleasure. This ordinance, though far more arbitrary, is very similar to those mentioned in the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064,

30 L. ed. 220. The ordinances in that case contained provisions to the effect that it should be unlawful for any person or persons to carry on a laundry within the limits of the city of San Francisco without first having obtained the consent of the municipal authorities, except the same be located in a building constructed either of brick or stone; and unlawful to erect scaffolding over or upon the roof of any building without first obtaining such consent. In commenting upon the arbitrary provisions indicated the supreme court said: "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be sufficient answer for them to say that the law had conferred upon them the authority to withhold their assent without reason, and without responsibility. The power given to them is not confided to discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges [209] neither guidance nor restraint. No reason for it is shown, and the conclusion cannot be resisted that no reason for it existed except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendments of the constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged." The very fact that the ordinance complained of in this case confers upon the council the absolute right to refuse its consent to the erection of any buildings, no matter out of what material it is to be constructed, where it is to be erected, or how necessary and useful to the public it might be, demonstrates the danger of intrusting any body of men with such arbitrary and despotic power. The circumstances surround-

ing its adoption by the council, and the fact that its aid was immediately invoked to justify the refusal of a building permit to the appellants, would seem to indicate that the enactment of the ordinance was and is a mere pretext for the arbitrary and unreasonable refusal of appellees to permit this building to be erected. If such was the purpose of its enactment, as well said by counsel for appellants, their imprisonment in satisfaction of the fines imposed upon them for the violation of its provisions would be as arbitrary and unjust as was the arrest of the Chinaman in the Yick Wo-Hopkins case. It must not be overlooked that, even if the ordinance on its face is valid, a discriminatory execution of it would be violative of both the federal and state constitutions, and subversive of justice as well.

The refusal of the common council of a building permit to the appellants in this case is attempted to be justified [210] upon the ground that the erection of the church and the holding of worship therein by the congregation would constitute a nuisance, and therefore that the council, under the "police power" that may lawfully be exercised by the municipality for the welfare of the public, has the legal right to abate or prevent nuisances. The only provisions of the charter of cities of the third class on the subject of buildings are found in subsections 24-26 of section 3290 of the Kentucky Statutes of 1899. These confer the following powers:

"24. Wooden Buildings—To Prevent Erecting and Provide for Removal of. To regulate or prohibit and prevent the erection of wooden buildings in such parts of said city as may be deemed proper, and to provide for the removal of the same at the cost of the owners, when erected or continued contrary to ordinance.

"25. Buildings—Regulating Construction of. To regulate the construction of all buildings in the city, to prohibit and prevent the construction of unsafe buildings, or buildings without adequate means of escape in case of fire, and to provide for the inspection of buildings and the construction of fire escapes.

"26. Removal of Dangerous Structures. To impose penalties upon the owner, occupant or agent of any house, wall, sidewalk, or other structures which may be considered dangerous or detrimental to the public, unless after due notice, to be fixed by ordinance, same to be remedied or repaired;

and to remove or repair same at the owner's expense when suffered to remain contrary to ordinance."

It will hardly be claimed that a church building to be constructed of brick, with a slate roof, and as nearly fire-proof as practicable, like that of the appellants, can be dangerous or detrimental to the public health or safety. The powers conferred on cities of the third class on the subject of nuisances [211] are found in subsections 14 and 16, section 3290 of the statutes, supra, which read as follows:

"14. Nuisances, Restraining and Preventing. To regulate, restrain or prevent the establishment or continuance in or near said city of any trade, or occupation, business or manufacturing, offensive to the public; or dangerous to health, or in causing or producing fire; and to regulate the sale of firearms, and to prevent the carrying of concealed deadly weapons."

"16. Police Regulations, Health, Comfort and Safety. To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public; and to define, declare, prevent, suppress and remove nuisances, either within the city, or within one mile thereof."

The term "nuisance" has a well-defined legal meaning. A thing cannot be declared a nuisance which is in fact not a nuisance.

In Brannon's treatise on the Fourteenth Amendment, it is said that "a municipal corporation cannot treat as a business that which cannot be such" (page 174), and that "a city or town cannot, by its mere declaration that a thing is a public nuisance, make a nuisance of that which is not essentially such. The question of nuisance or no nuisance is one for judicial review."

In the case at bar it is contended for appellees that the ordinance, which manifestly was passed to prevent the erecting of the appellant's church building, confers upon the common council the power to declare that a church building not yet erected, and which, when erected, will not be a nuisance, is a nuisance. If it be possible that the colored Baptist people can hold their church services in an orderly way, then the building of their church cannot be held to be a nuisance. In Pfingst v. Senn, 94 Ky. 556, 15 Ky. Law Rep. 325, 23 S. W. [212] 358, 21 L. R. A. 569, this court held that: "Injunction against a threatened nuisance will not be granted when the

thing complained of is not per se a nuisance, but may or not become so according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury. The opening of a beer garden, dancing-hall, and bowling-alley in a city will not be enjoined, although the same place of amusement, as formerly conducted, may have been a nuisance." It would be strange, indeed, to find it announced in the law books or authoritatively declared by any court of final resort that a beer garden or dancing-hall may exist in a city, yet a brick, fire-proof church may not be erected or maintained therein; and, as urged by counsel, is the fact that the members of the First (Colored) Baptist Church sang louder in their old and dilapidated building than was agreeable to some of the contiguous residents any evidence that such would be their manner of singing in the new one? In Albany Christian Church v. Wilburn, 112 Ky. 507, 23 Ky. Law Rep. 1820, 66 S. W. 285, this court, in discussing whether a stable was a nuisance, quoted with approval from St. James Church v. Arrington, 36 Ala. 546, 76 Am. Dec. 332, wherein it is said: "Whenever it is legally ascertained that it has become a nuisance, a court of equity will protect by injunction the party injured thereby. But as, in the present case, it is yet uncertain, and remains to be ascertained from future events, whether or not the erection will become a nuisance, there is no ground for injunction arresting the further progress of the building, or its appropriation to use intended." In view of these authorities, the police judge was without power to hold, and the common council of the city of Frankfort in rejecting appellant's request for a permit to erect the church building, was without [213] authority to declare, a house to be erected and dedicated to the worship of God a nuisance.

There can be no doubt of the right of appellants to maintain this action. The law authorizing it has been repeatedly declared by this court. Thus, in City of Newport v. Newport etc. Bridge Co., 90 Ky. 193, 12 Ky. Law Rep. 39, 13 S. W. 720, 8 L. R. A. 484, it was held that: "If a city ordinance is invalid, one who is affected by it has the right, in order to prevent irreparable injury and a multiplicity of prosecutions, to go into a court of equity for relief." The court also said in the same case: "The chancellor often interferes to prevent an illegal use of power by municipal authorities, and, where such consequences follow the enforcement of an ordinance, as will result in this instance, a proper case is presented for

equitable relief if the ordinance be invalid." To the same effect is the rule announced in South Covington v. Berry, 93 Ky. 43, 40 Am. St. Rep. 161, 13 Ky. Law Rep. 943, 18 S. W. 1026, 15 L. R. A. 604, wherein the court said: "The appellees, the mayor and chief of police of the city, being about to enforce an ordinance by having the company's officers arrested and its cars returned to the stable, this action was brought enjoining it. If the ordinance was invalid, then, to prevent a multiplicity of prosecutions, and such consequences as would necessarily result from its enforcement, the company had the right to ask the preventative equitable relief. This is often done to prevent the illegal exercise of power by municipal authorities." It is, however, contended for appellees that this action is only to enjoin a judgment of the police court, and such an action under the Civil Code can be brought only in the court which rendered the judgment sought to be enjoined. Manifestly, that rule cannot apply here, as the police judge in cities of the third class is wholly without civil jurisdiction. But, [214] in any event, the main purpose of this action is to attack the validity and constitutionality of the ordinance under which the appellants' property rights have been arbitrarily interfered with—in fact, denied them—in contravention of both the federal and state constitutions. The enjoining of the judgment of the police court is therefore only an incident—a side issue growing out of the principal transaction complained of in the petition.

It is further insisted for appellees that the issues presented in this action are res adjudicata; that is, that they were determined in the first suit tried by the special judge. It is averred in the reply, which does not appear to be controverted, that the first or old suit, which was brought by Buckley, contractor, of the church building, and others, to enjoin the city from enforcing an ordinance of older date than the one now complained of, was tried by the special judge, who seems to have dismissed that action upon demurrer to the petition, and because he assumed that the police judge before whom were then pending the prosecutions against Buckley and others, involving the validity of that ordinance, would determine that question. It appears, however, that the first suit did not embrace some of the parties to this action. It also involved the validity of a different ordinance, and the police court had not then passed on the validity of the old ordinance. That court did subsequently hold it valid. In the meantime the

present ordinance, the validity of which is attacked, in this action, was adopted by the council pending the decision of the police judge on the validity of the old one. We are of the opinion, therefore, that the defense of res adjudicata is not available.

We have reached the conclusion that permission to erect the church building was denied the appellants for no other [215] reason than that the worship therein, and thereafter to be conducted, was and will be objectionable to the immediate neighbors; and the further fact is not to be disguised that this objection to the erection of the building is largely based upon race prejudice. However natural this prejudice may be, when it superinduces unjust discrimination in the adjustment of mere legal rights, it becomes obnoxious to the law.

The questions arising upon this record present no disturbing social problem. The matters to be adjudicated are purely legal in character. Undoubtedly, it can be shown that the presence in a neighborhood of a church for colored people is not desirable to the surrounding property holders of the white race, but it cannot be more disagreeable than the near presence to one's residence of a noisy manufactory, beer garden, dancing-hall, or other obnoxious trades, which are so generally tolerated in all cities. "One living in a city must necessarily submit to the annoyances which are incidental to city life. It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher and laborer, as well as the wealthy employed or unemployed citizen, to constitute a city. They all have rights, and the only requirement of the law is that each shall so exercise and enjoy them as to do no injury in that enjoyment to others, or the rights of others": Pfingst v. Senn, 94 Ky. 556, 15 Ky. Law Rep. 325, 23 S. W. 358, 21 L. R. A. 569. Being of the opinion that the ordinance complained of is unconstitutional for the reasons hereinbefore stated, and that the prosecution of the appellants in the police court, as well as the refusal of the council to permit them to erect their church building attempted to be justified under [216] such ordinance, were unauthorized by law, the judgment of the lower court is reversed, and cause remanded, with directions to that court to grant appellants the relief asked, to perpetuate the injunction, and for such other proceedings as may not be inconsistent with this opinion.

The Constitutionality of Building Regulations is the subject of a monographic note to Bostock v. Sams, 93 Am. St. Rep. 405-411.

What are Public Nuisances is the subject of a recent extended note to Acme Fertilizer Co. v. State, 107 Am. St. Rep. 195-252.

IRVINE v. GIBSON.

[117 Ky. 306, 77 S. W. 1106.]

INSANE PERSON'S Liability for Slander.—If it appears that at the time of speaking defamatory words the speaker was either totally deranged, or was laboring under an insane delusion on the subject to which the words relate, insanity is a good defense in an action for slander. (p. 255.)

APPEAL—Reduction of Amount of Recovery.—In reversing an erroneous judgment for slander, the supreme court has no authority to order a remittitur of an excessive portion of the recovery. (p. 258.)

ABATEMENT OF ACTION—Death of Appellant.—If the defendant in an action for slander appeals from a judgment recovered against him, and then dies, the appellate court, on reversing the judgment for error in instructions cannot, to prevent an abatement of the action, put the appellant administrator on terms by requiring him to enter his assent of record that the judgment shall stand as security for whatever damages may be found for the appellee on a second trial. (p. 258.)

R. W. Miller, Smith & Bush and J. W. Caperton, for the appellant.

J. A. Sullivan and J. T. Cobb, for the appellee.

315 SETTLE, J. The appellee, Florida Gibson, a young woman of excellent character, residing in Madison county, instituted in the circuit court of that county an action for slander against the appellant, Bettie H. Irvine, and her husband, I. Shelby Irvine, laying her damages at thirty thousand dollars. These are the slanderous words set forth in the petition, viz.: "Florida Gibson left here this summer, and had a baby, and I know it is so." It is averred in the petition that the slanderous words were falsely and maliciously spoken and published by Bettie H. Irvine of and concerning the appellee, and though it appears from the bill of evidence, made a part of the record, that other harsh and false charges derogatory to the character of the appellee were made by Mrs. Irvine, the words complained of were shown

to have been spoken but one time, and in the hearing of but one person. I. Shelby Irvine entered a motion to require the appellee to elect which of the defendants she would prosecute her action against, which motion was sustained by the lower court. Appellee elected to prosecute her action against Bettie H. Irvine, which caused its dismissal as to I. Shelby Irvine. Thereafter I. Shelby Irvine, as the husband of Bettie H. Irvine, and assuming to act as her next friend, filed an answer to the petition, in which it was averred that she was a person of unsound mind and unable to defend the action for herself, and that if the slanderous words were spoken by her it was when she was of unsound mind and unable to understand what she said [316] or the meaning of the words used. On motion of appellee this answer was by the court stricken from the file, and the court then appointed two able and experienced members of the Madison county bar guardians ad litem to defend for Bettie H. Irvine. The guardians ad litem by answer set up for their ward the defense that the words complained of were not spoken by her, or, if they were spoken, that she was at the time of the speaking laboring under a pronounced and well-defined monomania or delusional insanity upon the subject of her husband's relations with women, which incapacitated her from knowing what she said of the appellee, or the meaning or effect of the words complained of. In addition, the answer contains the following testimonial to the appellee's character: "They further state that the plaintiff is a woman of most excellent character, esteemed by her friends, and respected by the community as a woman of pure life and chaste character." The answer of the guardians ad litem, except as to the testimonial to appellee's character, was controverted by the reply filed by the appellee, and upon the issues thus formed the case went to trial, which resulted in a verdict and judgment for the appellee for thirty thousand dollars in damages.

The guardians ad litem entered motion and grounds for a new trial, which was refused by the trial court, and the case is now before us for review upon the appeal of Bettie H. Irvine, by the guardians ad litem. And Bettie H. Irvine having died since the taking of the appeal, the same has been revived in the name of I. Shelby Irvine, administrator of her estate, he having been appointed as such administrator by the Madison county court.

The grounds relied on for a new trial are eighteen in number, but as, in our view of the case, the fourth ground authorized the granting of the new trial asked, it will not [317] be necessary to consider the others. This ground complains of the failure of the lower court to instruct the jury that insanity or monomania was a complete defense to the action. In other words, it is contended by the appellants that the lower court should have either peremptorily directed the jury to find for the appellant, Bettie H. Irvine, or instructed them that if they believed from the evidence that at the time of the speaking of the slanderous words, if she did speak them, she was of unsound mind, that is, laboring under such monomania or delusional insanity upon the subject of her husband's relations with other women, as to incapacitate her from knowing what she said in using the slanderous words of appellee complained of, or the meaning or effect of such words, they should find for the defendant.

Mr. Justice Cooley, in his admirable work on Torts, discusses at great length the responsibility of lunatics for torts. He seems to be of the opinion that though they cannot, because of the absence of a criminal intent, be punished for acts that would be criminal if committed by a sane person, nevertheless in certain cases they or their estates may be held civilly liable for torts committed by them, but that they nor their estates are responsible in actions for slander or libel. An illustration of this point may be found on page 99 of the volume supra, where it is said: "The case of an injury suffered at the hands of a lunatic furnishes us with an apt illustration. Let it be supposed that one of this unfortunate class meets a traveler on the highway, and by force or by terror of his threats takes from him his horse and vehicle, and abuses or destroys them. In a sane person this may be highway robbery; but the lunatic is incapable of a criminal intent, and therefore commits no crime. Neither is the case one in which a contract [318] to pay for the property or for the injury can be implied, for the law can imply no contract relations where the capacity to enter into them is withheld. But a plain wrong has been done, because the traveler has been deprived of his property, and, if the person at whose hands the wrong has been suffered is possessed of an estate from which compensation can be made, no reason appears why this estate should not be burdened to make it. In other words, it seems but just that the consequences of the

unfortunate occurrence should fall upon the estate of the person committing the injury rather than upon that of the person who has suffered it. One eminent law-writer has doubted if there ought to be any responsibility in such a case. In the case of a compos mentis, he says, although the intent be not decisive, still the act punished is that of a party competent to foresee and guard against the consequences of his conduct, and inevitable accident has always been held an excuse. In the case of a lunatic, it may be urged both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accident." In discussing whether a person of unsound mind is responsible for slanderous or libelous words, Mr. Cooley further says: "It has been seen that in some cases malice is a necessary ingredient of the tort. How can a non compos be responsible in such cases; such, for instance, as a malicious prosecution or libel? Legal malice certainly cannot be imputed to one who in law is incompetent to harbor an intent. It would seem a monstrous absurdity, for instance, if one were held entitled to maintain an action for defamation of character for the thoughtless babbling of an insane person, or for any wild communication he might send through the mail or post upon the wall. There can be no tort in [319] these cases, because the wrong lies in the intent, and an intent is an impossibility. The rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element. And if, in the case of defamatory publications, it may be said that, after all, the requirements of malice as an element in the wrong is only nominal, still there can be no tort because presumptively the utterances, or rather publications, which proceed from a diseased brain, cannot injure": Cooley on Torts, p. 103.

"In reason, an insane person cannot have the malice essential in slander and libel. And this doctrine may be deemed to be sufficiently, though not very firmly, established": Bishop on Noncontract Law, sec. 506.

"Inasmuch as malice, actual or implied, is an element of slander, a person is not liable in damages therefor, if, at the time of speaking the defamatory words, he was totally deranged, or was the victim of insane delusion on the subject to which the words related": 16 Am. & Eng. Ency. of Law, 2d ed., 622.

"Insanity is a complete defense to an action for slander or libel": Townshend on Slander, 3d ed., sec. 248; Bryant v. Jackson, 6 Humph. (Tenn.) 199; Horner v. Marshall's Admx., 5 Munf. (Va.) 466; McDougald v. Coward, 95 N. C. 368.

This court is asked for the first time to say whether or not insanity is a good defense in an action of slander. In view of the authorities, supra, we are of the opinion that the question should be answered in the affirmative. Insanity, however, viewed anciently, is in modern times deemed a visitation from God, a disease or malconstruction of the mind. If God does not hold accountable for their misdeeds those whom he suffers to be thus afflicted, shall his creatures, intrusted with the enforcement of human laws, refuse [320] to excuse their ostensible evil-doing? Surely not. But while such is our view of the law, we would say that, in order to defeat a recovery in a case like the one at bar upon the ground of insanity, it should satisfactorily appear from the evidence that at the time of speaking the defamatory words the person uttering them was either totally deranged, or laboring under an insane delusion on the subject to which the words related. In considering the evidence as to the condition of mind of the unfortunate woman against whom the recovery was had in this case, we have been profoundly impressed by its weight and force. Without undertaking to discuss it in detail, or to mention the names of witnesses, we find that it manifests the facts that Mrs. Irvine was the fortunate possessor of practically unlimited wealth, a happy home, and devoted husband. It seemed to be the constant aim of the husband to minister to her happiness. Both time and money were lavishly expended by him in the effort to restore her health and surround her with all that makes life desirable. She was apparently as devoted to her husband as he was to her. During all their married life he gave her no cause to doubt his affection for or loyalty to her, and in his relations with respect to other women his conduct was exemplary in the extreme. But with the passing years disease, such as sometimes afflicts her sex, came upon her, insidiously at first, but later with such force as to undermine her constitution, wreck her health, and practically destroy her mind. For fifteen years before her death she was thus afflicted. Repeated operations were performed upon her by the best and most experienced physicians and

surgeons, and she was taken by her husband to sanitariums and health resorts in the effort to restore her health, but without avail. According to the [321] evidence, soon after the disease fastened upon her body, her mind began to give way, and about four years before her death her health became so impaired that she was possessed of delusions and imaginings, which for the remainder of her life controlled her actions, dominated her will, and wrecked her mind. From an affectionate and trusting wife, she, without cause, became jealous and suspicious of her husband, and her mind dominated by the delusion that he was unfaithful to her. When laboring under these delusions she was incapable of being reasoned with, or of knowing or understanding what she said or did. When told that her suspicions against her husband were groundless, and her charges of infidelity on his part untrue, she would grow excited and cry out with rage. She was especially under the delusion that her husband had become the father of a child by a young woman who lived with the appellee, and she, without cause, accused the latter of harboring the mother and child. Any woman that she met, particularly one with a child, became to her disordered mind and frenzied imagination the object of her husband's love. This condition of Mrs. Irvine's mind was established by the testimony of divers witnesses, several of them the most distinguished physicians and specialists on diseases of the mind in the country; others being business men, friends and neighbors of herself and her husband, who knew her well, and had every opportunity to become acquainted with her condition of mind. These witnesses all agree that her mind was disordered and her reason dethroned on the subject of her husband's relations with other women. The physicians testified that her disease of mind was known as monomania, and that it was incurable. There were witnesses introduced by the appellee who testified to the effect [322] that Mrs. Irvine was of sound mind, but all of these witnesses were nonexperts, and only two, certainly not more than three of them, had such association with or knowledge of Mrs. Irvine as gave them opportunity to testify understandingly in regard to her mind. What they stated amounted in the main to mere expressions of opinion, with little to base the opinion upon.

It was said by this court in Brown v. Commonwealth, 14 Bush, 398, in discussing nonexpert evidence on the ques-

tion of insanity: "Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained." Again: "The court must be satisfied that the witness has had an opportunity, by association and observation, to form an opinion as to the sanity of the person in reference to whom he is to speak." Tested by this rule, we incline to the opinion that the testimony of all but three of appellee's witnesses as to the condition of Mrs. Irvine's mind was of little, if any, value, and much of it incompetent.

If correct in our view of the law of this case, it follows that the instructions of the lower court to the jury were altogether erroneous. In addition to the customary and general instruction setting forth the grounds which, if sustained by the evidence, would authorize the jury to find for the plaintiff, the court should have instructed them as to the measure of damages; and, finally, that if they believed from the evidence that, at the time of the speaking of the defamatory words by the defendant, she was insane, or laboring under delusional insanity upon the subject of her husband's relations with women which incapacitated her from knowing or understanding the meaning of the defamatory words, they should find for the defendant.

323 It is proposed of record by the appellee that this court, in the event it should find the amount of the verdict and judgment excessive, may, instead of reversing the judgment, reduce the amount thereof to such a sum as it may deem proper. We are of the opinion that we are not authorized to enter the remittitur. If the judgment is erroneous, we can only reverse it, and our jurisdiction over the case ceases with its reversal. The remittitur cannot be entered after the reversal, for the further reason that there will be nothing upon which it can operate, because by the reversal the judgment is rendered void. And by such a course of action as is here proposed, the parties in other cases, following the precedent thus set, by like means would avoid the consequences of erroneous proceedings, to the prejudice of those against whom they were committed.

It is also insisted for appellee that if the court should find it necessary to reverse the judgment of the lower court, it should put the appellant upon terms by requiring him to enter his assent of record that the present judgment shall stand as security for whatever damages may be found for

appellee upon a second trial and Turner's Admr. v. Booker, 2 Dana, 334, is relied on in support of this contention. We are unable to grant this request, because without power to do so; nor do we regard Turner's Admr. v. Booker, 2 Dana, 334, as authority in point. The judgment in that case went against Turner in the lower court by default. He moved for a new trial, for cause set out in his affidavit. The motion was laid over to the succeeding term, before which time Turner died. The judgment was all the while suspended by the motion for a new trial. The motion for a new trial was finally overruled by the lower court, and upon appeal to this court it was held that the affidavits presented by Turner in the lower court were sufficient to [324] authorize a new trial; consequently the case was reversed; but, as a naked reversal would operate to abate the action altogether, upon its return to the lower court on account of Turner's death it was deemed just to put the administrator of his estate upon terms, as was done, because it was not the fault of Booker, but that of Turner, that he did not make defense before judgment and obtain a trial of the case upon its merits. The court therefore refused to allow his fault to be made the possible instrument of a great injustice. The case at bar is wholly different. Here there was a trial; the appellant administrator, his deceased wife, and her guardians ad litem are without fault, but grave errors were committed by the lower court to appellant's prejudice, resulting in a verdict for damages with one exception unprecedented in this state as to amount. In that case the motion for a new trial only suspended execution against Turner. Here the rights of the surety on the supersedeas bond have intervened, and will be affected. This court can only declare the law, though the effect of its so doing in this case will be to abate the appellee's action upon its return to the lower court because of the death of the appellant, Mrs. Irvine.

For the reasons indicated the judgment is reversed and cause remanded, with directions to the lower court to set aside the verdict and judgment and dismiss the petition.

Petition for rehearing by appellee overruled.

An Insane Person is responsible for his torts, except as to those in which intention or malice is a necessary ingredient: Williams v. Hays, 143 N. Y. 442, 42 Am. St. Rep. 743, and note. Being incapable of entertaining a malicious intention, however, he cannot be held answerable in exemplary damages: Holdom v. Ancient Order of United Workmen, 159 Ill. 619, 50 Am. St. Rep. 183.

GADDIE v. COMMONWEALTH.

[117 Ky. 468, 78 S. W. 162.]

HOUSE-BREAKING by Removal of Window Strip.—To remove an outside window strip, thus leaving the window unprotected so that it may easily be lifted out, in order to enter a warehouse to steal, does not constitute a breaking of the building, if additional force is necessary to remove the window and make entry possible. (p. 261.)

G. K. Halbert, for the appellant.

N. B. Hays, attorney general, and Loraine Mix, for the appellee.

469 BARKER, J. Appellant was indicted, charged with the offense of unlawfully breaking a warehouse belonging to Leischardt & 470 Murdock, in Vine Grove, Hardin county, Kentucky, with intent to steal therefrom. A trial resulted in a verdict of conviction, and a sentence of the defendant to three years in the penitentiary, of which he is now complaining. The bill of exceptions consists of the following agreement of facts: "It is agreed that the evidence herein showed that the act done was committed in Vine Grove, Hardin county, Kentucky, upon the storehouse of Leischardt & Murdock; that one outside window strip, which fixed and held the window firmly in place, had been pried open from the bottom, and some of the nails drawn out of it, by the defendant, Ed Gaddie, and the strip left hanging loose from the top; that the window remained unmoved in its place, but was left unprotected on one side, so it could have been easily lifted out, but there was no opening made to the interior of the building. It is further agreed that the evidence showed that the said act was done with intent that stealing should be committed therefrom."

No entry could have been made into the warehouse after the window strip was loosened. Undoubtedly appellant began to break into the house, but he did not finish the attempt. The term "breaking" as used in the statute has a well-known and definite meaning at common law, with reference to the offense of burglary; and, in order to constitute it, the action of the defendant must have been such as would, without additional effort, have made an entry possible. The term is used in the statute in its common-law sense. Robertson, in his work on Kentucky Criminal Law and Procedure, section 302, after defining burglary at common law, says: "As we

shall hereafter see, the statutes of this state provide against breaking into dwelling-houses and other buildings, whether in the night or day, and the foregoing statement [471] as to breaking, entry, etc., applies equally to these statutory cases." In section 303 he says: " 'Breaking,' as used in this connection, implies force, but the slightest force is sufficient. Thus the lifting of a latch, or the turning of a knob in opening a door, the picking of a lock, or opening with a key, or pushing open a closed door, though it is neither latched, bolted nor locked, the hoisting of a window, the removal or breaking of a pane of glass, or unloosening any other fastening of a door or window which the owner has provided for securing the house from an actual breaking. But any breaking which enables the defendant to take the property out through the breach with his hands is sufficient breaking, if the intent was felonious. On the other hand, there is no breaking where the entering is through an open door or window, or other aperture, or even pushing further open a door partly open, or raising a window partly raised; and it is held that merely breaking the blinds is not sufficient to warrant conviction, when there has been no entry beyond the sash of the window." Bishop, in his new work on Criminal Law, section 91, says: "A breaking, in the law of burglary, is any disrupting or separating of material substances in any inclosing part of a dwelling-house, whereby the entry of a person, arm or any physical thing capable of working a felony therein may be accomplished." Subsection 2 of section 95: "If there are inside shutters, it is enough to pass in the hand for the unaccomplished purpose of opening one of them, but the breaking of an outside shutter is not sufficient while the place remains unbroken." Greenleaf, in his work on Evidence, sixteenth edition, volume 3, section 76, thus states the rule: "The breaking of the house may be actual, by the application of physical force; or constructive, where an entrance is obtained by fraud, threats or conspiracy. An actual breaking may be [472] by lifting a latch; making a hole in the wall; descending the chimney; picking, turning back or opening the lock with a false key or other instrument; removing or breaking a pane of glass, and inserting the hand, or even a finger, pulling up or down an unfastened sash; removing the fastening of a window by inserting the hand through a broken pane; pushing open a window which moved on hinges and was fastened by a wedge;

breaking and opening an inner door after having entered through an open door or window; or other like acts. The breaking must also be into some apartment of the house, and not into a cupboard, press, locker or the like receptacle, notwithstanding these, as between the heir and executor, are regarded as fixtures."

In the case of State v. McCall, 4 Ala. 643, 39 Am. Dec. 314, it appears that the accused had broken open the outside shutters of a window, but had proceeded no further, leaving the window still intact. The court said: "It cannot be that the common security of the dwelling-rouse is violated by breaking one of the shutters of a door or window which has several. True, it weakens the security which the mansion is supposed to afford, and renders the breach more easy. But as additional force will be necessary before an entry can be effected, there can, under such circumstances, be no burglary committed. Suppose the shutters of a door, made by placing planks upon each other until it is two or three double, if the thickness of one of the planks be removed by one intending to commit a burglary, and an entry thus far made, can it be said that the offense was completed? What, in point of principle, is the difference between such a case and one where there are several shutters, an inch or two apart from each other? In neither case can such an entry be made as will enable the aggressor to commit a felony. [473] To constitute burglary, an entry must be made into the house with the hand, foot or instrument with which it is intended to commit a felony. In the present case there was nothing but a breach of the blinds, and no entry beyond the sash window. The threshold of the window had not been passed, so as to have enabled the defendant to consummate a felonious intention; and, according to the principle we have laid down, the charge to the jury was erroneous."

The case of Rose v. Commonwealth, 19 Ky. Law Rep. 272, 40 S. W. 245, cited by the attorney general, has no application to the case at bar. There the accused removed a prop which constituted the fastening of a door; thus opening the door, and leaving nothing further to be done, in order to effect an entrance. In the case at bar, in order to make an entrance into the warehouse, it was necessary to remove the window by additional force. The effort on the part of the accused to break the warehouse in question was incomplete, and constituted no more than a trespass.

At the close of the commonwealth's testimony, a peremptory instruction should have been given the jury to find the accused not guilty.

The judgment is reversed for proceedings consistent herewith.

What Constitutes a "Breaking" within the meaning of the law of burglary is discussed in the note to People v. Richards, 2 Am. St. Rep. 383. As a general rule, breaking may be by any act of physical force, however slight, by which the obstruction to entering is removed: Ferguson v. State, 52 Neb. 432, 66 Am. St. Rep. 512. The hoisting of a closed window may constitute a breaking: Clairborne v. State, 113 Tenn. 261, 106 Am. St. Rep. 833.

UNDERHILL v. MURPHY.

[117 Ky. 640, 78 S. W. 482.]

CONSTITUTIONAL LAW.—The Right to Carry on a Business and carry out contracts made in the course thereof is a property right within the constitutional guaranty of the right to acquire and protect property. (p. 264.)

STRIKE INJUNCTION — Criminal Acts. — An injunction against strikers to prevent them from destroying the plaintiff's business and intimidating his employés, will not be refused on the ground that the acts complained of are of a criminal nature, and that to punish them as contempts amounts to an assumption of criminal jurisdiction without the intervention of a jury. (p. 265.)

INJUNCTION—Adequate Remedy at Law.—The rule that an injunction will not be granted where there is an adequate remedy at law refers to legal remedies, and not to criminal proceedings. (p. 266.)

STRIKE INJUNCTION—Criminal Acts—Legal Remedy.—An injunction against strikers to prevent them from destroying the plaintiff's business and intimidating his employés, will not be refused on the ground that the law furnishes an adequate legal remedy by having the defendants give security to keep the peace. (pp. 266, 267.)

Orlando P. Schmidt, for the appellant.

J. L. Elliston, for the appellees.

643 HOBSON, J. Appellant, John T. Underhill, is a plumber engaged in business in Covington, Kentucky, taking contracts in plumbing, and has in his employ journeymen plumbers. He has followed the occupation for a number of years, and has built up a large and lucrative business in Covington and adjoining cities, which is of great pecuniary value to him. He had on hand a number of important contracts in

plumbing, including the contract for the plumbing in the new courthouse in Covington. The appellees, with the exception of Horgan, had been employed by Underhill in his plumbing business, working for wages. The appellees were members of a union organized for the protection of labor. A difference arose between Underhill and his workmen, who were members of the union, in reference to its relation with employers, and they then quit his employment. About this time a general strike occurred among those employed by master plumbers in Covington. In order to carry out his contracts when his employés left him, Underhill employed nonunion men to work in place of the union men who had quit. The appellees thereupon undertook to prevent the nonunion men from working by following them from place to place about the city, assembling about Underhill's shop, denouncing and threatening Underhill and his workmen. This continued for several weeks, and Underhill filed suit asking an injunction [644] restraining the unlawful acts of the defendants. He alleged that he depended upon his business for a livelihood; that for three weeks continuously next prior to the institution of the action, the appellees, in pursuance of a conspiracy to break up his business, had collected together daily near and in sight of his place of business, where they could observe every one going into or coming out of it, and by threats, intimidation, force and violence attempted to compel his employés to quit his service; that they followed him and his employés to the places in the city where they were engaged at work carrying out contracts previously made by him, and there insulted them with opprobrious epithets, threatened them with violence, and assaulted them, so that on several occasions he had been compelled to call in the police force of the city to escort them away from the place, and protect them from the violence of the appellees; that the defendants threatened to assault and beat him and his employés, to prevent anyone from working for him, to prevent his customers from coming to or employing him, to destroy his goodwill, and to break up his business; and that all of these unlawful acts had continued from day to day and from hour to hour, in pursuance of the conspiracy formed between appellees; that the appellees were insolvent and had no property subject to execution out of which the damages sustained by him might be made, and that, unless restrained by the court, they would proceed to carry out their threats,

and completely break up his business and destroy its goodwill. Proof was heard on a motion for an injunction, which fully sustained the allegations of the petition. In fact, the proof is perhaps stronger than the pleading. It shows that the appellees not only picketed plaintiff's place of business, but that, to protect his employés from violence, he had to take them to and from the places where they worked in a conveyance, and [645] that they had to enter his place of business through the alley and back door and over rear fences; and even then one of them was waylaid and beaten by three of the appellees.

The proof shows a determined effort by conspiracy on the part of the defendants to break up and destroy the plaintiff's business by force and violence unless he acceded to the demands of the union to which they belonged. At the conclusion of the evidence the court sustained a demurrer to the petition, and overruled the motion to grant the injunction. The plaintiff declining to plead further, the action was dismissed.

When a man has, by years of toil and fair dealing with his customers, built up a valuable business and goodwill, he is as much entitled to protection by the law in this species of property as in the home that shelters him, or the coat that protects him from the winter's cold. The right of the plaintiff to carry on his business and to carry out the contracts which he had made was a valuable property right, and no less intrinsically property than if the same amount of money had been invested in a stock of merchandise or a city lot. If the defendants had conspired together by force and violence to burn up the merchandise, or to carry off the surface of the lot, upon elementary principles, the chancellor would protect the plaintiff from the destruction of his property. The acts of the defendant as truly destroyed the plaintiff's property when they broke up his business by force and intimidation as they would have done in the case of visible property by burning it or carrying it off. Among the inalienable rights which by the first section of the state constitution are guaranteed as inherent in all men is "the right of acquiring and protecting property." The right to acquire and protect property is as sacred in the case of intangible property as tangible, and an injunction may be granted [646] to protect intangible rights no less than those that are tangible.

The learned circuit judge refused to interfere on the ground that the acts committed by the defendants are criminal in nature, and punishable by the police department; that, if he had jurisdiction to enjoin the commission of the acts, it necessarily followed that he had jurisdiction to enforce a penalty for a violation of his order; and that this would amount, in substance, to holding that he could try and convict the defendants for a criminal act without the intervention of a jury. We cannot concur in this reasoning. If the defendants were undermining the plaintiff's house, or about to slide it with his family in it out into the Ohio river, an injunction would not be refused on the idea that, if they thus drowned any of the people in the house, they might be punished for murder, or, if they destroyed the house only, they might be indicted under the statute for the willful destruction of private property. The reason is plain: the punishment of the defendants for murder or for the destruction of the house, while it would vindicate the majesty of the law, would not help the plaintiff in any way. To relegate him to the processes of the criminal law is to allow his property to be destroyed, and to give him no remedy therefor but the satisfaction of seeing the wrongdoers punished. The inherent and inalienable right of acquiring and protecting property which is guaranteed by the constitution means nothing if it means only this. If a man must stand by and see his property destroyed, and has no remedy but the slow process of the criminal law, which only punishes the offender, but restores nothing to him, then the constitutional guaranty of the enjoyment of life, liberty and property under the law is a meaningless generality. If, in this case, the defendants are fined in the police court, this will not restore to the [647] plaintiff the loss he has sustained by reason of the interruption of his business and his consequent inability to carry out his contracts. When his customers are driven away, and the goodwill of his business is destroyed, it will be too late, so far as he is concerned, for the punishment of the appellees by the criminal law to re-establish his ruined business, or even prevent future loss. If the circuit court had granted the injunction, and the defendants had disobeyed it, and he had punished them for contempt, the punishment would have been for their disobedience of the order of the court, regardless of whether their acts were also a violation of the criminal law of the land for which they might be in-

dicted and punished in the criminal court. His judgment punishing them for contempt would have been no bar to the criminal proceeding against them for their violation of the law, and would not have affected this proceeding in any way. His judgment would have established nothing more than that they were guilty of contempt of court in disobeying his orders. Whether they were also guilty of a criminal offense would have to be tried in the proper forum, and not in this action. The power of a court to punish for contempt is as old as the common law, and inherent in every court. The punishment for contempt would relate only to acts done after the injunction was granted, in disobedience of it; and even in this proceeding the defendants are protected as to a jury trial by section 1291 of the Kentucky Statutes of 1903, which provides: "A court shall not for contempt impose upon the offender a fine exceeding thirty dollars ($30), or imprison him exceeding thirty hours, without the intervention of a jury."

It is also urged that the plaintiff had an adequate remedy under the Criminal Code by having the defendants to give security to keep the peace and be of good behavior: Criminal Code Practice, sec. 382. The rule that an injunction will [648] not be granted where there is an adequate remedy at law refers to legal remedies, and not to criminal proceedings. In no case has it ever been otherwise applied, so far as we can find. The proceeding to require security to keep the peace is given in the code under title 10, which embraces proceedings to prevent the commission of offenses. It looks to the prevention of offenses, and not to the redress of private wrongs. It is begun by a warrant issued in the name of the commonwealth, and is a prosecution by the commonwealth, under the control of its officers. If a bond is required, it is taken to the commonwealth: Criminal Code Practice, secs. 383-392. When the plaintiff's property is about to be destroyed, he is entitled to a remedy in his own name, and which he can himself control to protect him in the enjoyment of his own. The fact that the commonwealth might also take out a proceeding to require the defendant to give security for good behavior is immaterial, for both proceedings may be prosecuted at the same time—one in the criminal court by the commonwealth, and the other in equity by the plaintiff; one to prevent the commission of offenses, the other to preserve the plaintiff's property from destruction. Were the

rule otherwise, an injunction could never be granted in the case of repeated trespasses, for in such cases the defendants might be put under bond for good behavior under the Criminal Code. But it has been uniformly held by this court that in such cases an injunction will lie: Preston v. Preston, 85 Ky. 16, 8 Ky. Law Rep. 633, 2 S. W. 501; Ellis v. Wren, 84 Ky. 254, 8 Ky. Law Rep. 285, 1 S. W. 440; Walker v. Leslie, 90 Ky. 642, 12 Ky. Law Rep. 581, 14 S. W. 682. The rule is universal: High on Injunctions, sec. 702.

The question before us has often arisen and the decisions uniformly so far as we can find, uphold the power of the chancellor to interfere by injunction in cases of this character. [649] The subject was exhaustively considered by the United States supreme court in Re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092, where the court thus stated its conclusion: "Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature. But when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law."

In Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722—a case very much like this—the court, in answer to the objections made here, said: "Nor does the fact the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime." So, in Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881, which was also a case very like this, the court, upholding the jurisdiction of the chancellor, said the cases were all against the defendant's contention. In Beck v. Teamsters' Protective Union, 118 Mich. 518, 74 Am. St. Rep. 421, 77 N. W. 21, 42 L. R. A. 407, which was also a similar case, the supreme court of Michigan said: "While some writers have doubted the remedy by injunction, it is now settled beyond dispute." To the same effect, see O'Neal v. Behanna, 182 Pa. St. 237, 61 Am. St. Rep. 702, 37 Atl. 843, 38 L. R. A. 382; Flaccus v. Smith, 199

Pa. St. 128, 85 Am. St. Rep. 779, 48 Atl. 894, 54 L. R. A. 640; Shoe Co. v. Saxey, 131 Mo. 212, [650] 32 S. W. 1006; Plant v. Woods, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; Port of Mobile v. Louisville R. R. Co., 84 Ala. 115, 5 Am. St. Rep. 342, 4 South. 106; High on Injunctions, secs. 20, 745, 752, 770. The constitutional right of free speech may not be infringed. Peaceful persuasions or lawful appeals to reason or sentiment may not be interfered with. But when intimidation and violence are resorted to, and thereby property is destroyed, or its safety imperiled, the chancellor may properly, by injunction, protect the owner of the property in the enjoyment of his constitutional right that his property shall not be taken from him. The enforcement of the criminal law is for the criminal court, but where the breach of the criminal law is also a violation of a property right, the chancellor may interpose by injunction to protect property.

The judgment appealed from is reversed, and the cause is remanded, with directions to overrule the demurrer to the petition and grant the temporary injunction as herein indicated.

Judges Paynter and Nunn dissent.

An Injunction will not be denied merely because the act sought to be restrained constitutes a crime: Columbian Athletic Club v. State, 143 Ind. 98, 52 Am. St. Rep. 407; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622; Klein v. Livingston Club, 177 Pa. St. 224, 55 Am. St. Rep. 717; Vegelahn v. Gunther, 167 Mass. 92, 57 Am. St. Rep. 443; State v. Zachritz, 166 Mo. 307, 89 Am. St. Rep. 711.

Strikes and Strikers are discussed in the note to O'Neil v. Behanna, 61 Am. St. Rep. 706-711. And boycotting is discussed in the recent note to Gray v. Building Trades Council, 103 Am. St. Rep. 488.

MUTUAL BENEFIT LIFE INSURANCE COMPANY v. HARVEY.

[117 Ky. 834, 79 S. W. 218.]

LIFE INSURANCE—Nonpayment of Premiums—Paid-up Policy—Minors.—A provision in a policy of life insurance to the effect that a failure by the insured for three months after default in the payment of premiums to surrender the policy, and request to have his interest applied to the purchase of a paid-up policy payable at the time the original policy would have been payable if continued in force, amounts to an election to have such interest applied to the purchase of term insurance for the full amount named in the policy and is not affected by the fact that the assignees of the policy are minors. (p. 272.)

William L. Dulaney and W. O. Harris, for the appellant.

George H. Galloway, for the appellees.

836 BURNAM, C. J. On the 4th of November, 1887, the appellant, the Mutual Benefit Life Insurance Company, issued a policy of insurance on the life of Hiram H. Harvey for three thousand dollars, payable at his death to his executors, administrators or assigns, in consideration of an annual premium of one hundred and seven dollars and eighty-two cents, which was to be due and payable on the 4th of November in every year during the continuance of the policy. On the 10th of October, 1888, Hiram Harvey assigned the benefit of this policy to his three daughters, Vashti, Roxianna and Rebecca Harvey, who were at that time infants of the respective ages of eighteen, ten, and eight years. The insured paid or secured to the satisfaction of the company the first five annual premiums, but failed to pay the premium due November 24,
837 1892; and the policy lapsed, in accordance with its terms at that date. Harvey died on the 2d of April, 1902. On the 6th of April, 1903, this suit was instituted by his children, to whom the policy was assigned on October 10, 1888, who alleged that "said policy lapsed because the premium was not paid on the fourth day of November, 1892; that at the time of said lapse there was fully paid-up insurance under said policy to the amount of five hundred and seven dollars, which became due and payable to them, as assignees, at the death of the insured, on the second day of April, 1902, and for which they pray judgment."

The defendant filed a general demurrer to plaintiff's petition, which was overruled. It then answered, pleading the following stipulation of the policy by way of defense:

"Provided that in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof at the office of the company in the city of Newark, or to agents, when they produce receipts signed by the president or treasurer, then in every such case this policy shall cease and determine, subject to the provisions of the company's nonforfeiture system, as hereon indorsed with accompanying tables.

"Nonforfeiture Provisions: When two full premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, its net reserve by the American experience mortality and interest at four per cent yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating term insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and the surrender thereof [838] to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy payable at the time this policy would be payable if continued in force."

And it alleged that three months after the lapse of the policy for nonpayment of premium on the 4th of November, 1892, no written application having been made, accompanied by a surrender of the policy, for paid-up insurance, the company, in accordance with the provisions of the policy, gave to appellees nonparticipating term insurance for the full amount of the policy for three years and one hundred and thirty-four days; this being the extended insurance which the net reserve due upon the policy at the time of its lapse, after deducting therefrom the premium loan indebtedness for one hundred and two dollars and seventy-five cents, with accrued interest thereon, was sufficient to purchase.

To this answer appellees replied, denying that they had elected to take extended term insurance for the full amount of the policy, and claimed that they were entitled to the amount due upon a paid-up policy which the net reserve would have purchased. The defendant demurred to the reply, which was overruled, and a jury trial resulted in a verdict and judgment for appellees for two hundred and ninety-five dollars, of which the company now complains.

The case involves the interest of the assured in that portion of the premium of the policy, with interest thereon, which is required to be reserved or set aside as a fund for the payment of the policy when it becomes due, which the uncontradicted testimony of the actuary of the company shows was one hundred and fifty-two dollars and sixty-eight cents, after deducting the indebtedness of the assured to the company on the 4th of November, 1892, the day of the lapse of the policy, which would purchase, at the company's rates, first, term insurance for three years and one hundred and thirty-four days [839] for three thousand dollars; second, a paid-up policy, payable at death, for two hundred and ninety-five dollars. It will be observed that the nonforfeiture provisions of the policy provide that the assured shall be entitled to the first named, or term insurance for the full amount of the policy, unless he makes application and surrenders his policy, in which case he may take the second, or paid-up policy, payable at his death. There is no contention or proof that the assured made application for or elected to take a paid-up policy of insurance for two hundred and ninety-five dollars. There can be no question, under the terms of the policy, that such application and surrender by the beneficiaries of the policy is a condition precedent to the issual of paid-up insurance. Otherwise it became the duty of the company, without application or request, to set aside for the benefit of the assured extended insurance for the full amount of the policy.

The only question, therefore, for consideration, is the power of the company to contract for these alternate benefits in case of a lapse. This exact question was before this court in the recent case of Crutchfield v. Union Cent. Life Ins. Co., 113 Ky. 53, 23 Ky. Law Rep. 2265, 2300, 67 S. W. 8, 67. It was there decided that the failure of the assured to surrender the policy or demand a paid-up policy was an election on his part, under the contract of insurance, to take the term insurance provided by the contract. In Drury's Admx. v. New York Life Ins. Co., 115 Ky. 681, 103 Am. St. Rep. 351, 25 Ky. Law. Rep. 68, 74 S. W. 663, 61 L. R. A. 714, the principle announced in the Crutchfield case was reaffirmed. In that case the company contended that the insured was only entitled to a life policy for paid-up insurance, instead of extended insurance.

It is insisted for the appellees, however, that as they were infants, without statutory guardian, when the policy lapsed,

840 they were not bound by these conditions of the policy, and are entitled to five years after attaining full age to make their election, and sue for the amount due upon a paid-up policy. No authorities are cited to support their contention, while, on the other hand it was decided in O'Laughlin v. Union Central Life Ins. Co., 2 McCrary, 543, 11 Fed. 280 (Judge McCrary delivering the opinion), that the fact that the beneficiaries named in the policy were minors would not prevent the enforcement of conditions of this character. In discussing this question, the court said: "It is said that, because the beneficiaries are minors, therefore the condition cannot be enforced. I have been unable to find any authority to support this proposition, and it seems counsel instanced none. The guardian can bring the suit, and is bound to bring it, under and according to the contract. It is not a suit that cannot be brought. It is not a suit that the parties, by reason of their disability, cannot bring. But it is a suit which the guardian can bring, and is bound to bring, I think, in accordance with the terms of the contract."

In Suggs v. Travelers' Ins. Co., 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847, the policy contained the following clause: "No suit or proceeding in law or equity shall be brought to recover any sum hereby insured unless the same is commenced within one year from the time the right of action accrued." The contention was there made that this clause did not apply to minors, who were beneficiaries. The court decided that the exception in the statute did not affect the agreement. The contract of the insurance company was with Hiram H. Harvey. By the express terms of the contract, he had the right at any time during the continuance of the policy to change the beneficiaries. The mere fact that he 841 transferred the benefit from his estate to his three daughters could not change the express stipulations of the contract of insurance between them. His assigns were equally bound thereby. It is not contended that the assignees, subsequent to the assignment, paid the premium installments, or any contract was made with them by the company, and it cannot be doubted for a moment that, if the assured had died within the period of extended insurance, appellees would have been prompt to have asserted their right, under the terms of the contract, and to the full amount of the policy.

We have reached the conclusion that the trial court erred in overruling the demurrer to the petition, and also in fail-

ing to give the jury a peremptory instruction to find for the defendant upon final trial. For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

For Contracts of Insurance similar to the one involved in the principal case except that the question of infancy is not raised, see Drury v. New York Life Ins. Co., 115 Ky. 681, 103 Am. St. Rep. 351, and cases cited in the cross-reference note thereto. A stipulation in a policy of insurance limiting the time within which suit may be brought thereon has been held good as against minor beneficiaries: Mead v. Phoenix Ins. Co., 68 Kan. 432, 104 Am. St. Rep. 412.

LOUISVILLE AND EVANSVILLE MAIL COMPANY v. BARNES.

[117 Ky. 860, 79 S. W. 261.]

NEGLIGENCE OF CARRIER not Imputable to Passenger.—The negligence of a carrier is not imputable to a passenger who is injured by the concurrent negligence of the carrier and another, and he may recover against both. (p. 275.)

RELEASE of One Joint Tort-feasor as Release of All.—A release of one joint tort-feasor, upon his making part satisfaction only, does not discharge the others, except pro tanto. (pp. 277, 278.)

Powers & Anderson, for the appellants.

George W. Jolly and W. T. Owen, for the appellee.

[865] NUNN, J. This appeal is from a judgment of the Daviess circuit court, rendered at its October term, 1902, against the appellant, Louisville and Evansville Mail Company, and in favor of John [866] T. Barnes, administrator of Clara R. Barnes, deceased. The judgment was for two thousand dollars.

The facts of the case, as they appear of record, are, in substance, as follows: About 11:30 o'clock on the night of the 12th of July, 1901, Clara R. Barnes lost her life by drowning in the Ohio river at Owensboro, Kentucky. The young lady, together with about four hundred other persons, embarked early in the night on an excursion boat of the Marsden company called the "Fawn," with two barges attached, for a pleasure trip up the Ohio river to Rockport, Indiana, and return. On the return, and for the purpose of disembarking its passengers, this steamer landed at Owensboro, Kentucky, at the upper end of appellant's wharf-boat, the barges lying

"head on" at the forward end of the wharf-boat. The proof of appellee showed that the barges were properly and securely fastened to the wharf-boat with a rope attaching the "Fawn" to the bank or shore to keep her from swinging out into the stream. In this situation there was no space between the barges and the wharf-boat. The passengers left the barges by stepping down fifteen or sixteen inches onto the front of the wharf-boat. About fifty of the passengers had disembarked, when the deceased, Clara Barnes, in attempting to make this step from the barge to the wharf-boat, fell between them, and was drowned. According to appellee's proof, this separation was caused by one of the boats of appellant coming in to the wharf-boat "head on," striking the wharf-boat at the upper end, thereby forcing the separation at the place and the time she made her step; that this was an improper and negligent landing of the appellant's boat; that those in charge of it saw the situation of the boat and barges of the Marsden company and the disembarkation of its passengers. On the other hand, appellant claims that it did not make its landing in that manner; that [867] it made a proper, easy and safe landing, and did not cause the separation of the barges and the wharf-boat; that the separation was produced from some other cause; that in fact the deceased fell between the two and lost her life before appellant's boat made its landing, or even touched the wharf-boat; that the deceased lost her life by reason of the negligence of the Marsden company in making an improper landing at the wharf-boat, by failure of the Marsden company to use a stage plank for the use of the passengers to pass from the barge to the boat, or by the contributory negligence of the deceased herself in not using ordinary care for her own safety. Appellee sued both companies, charging joint and concurring negligence, but just before the trial dismissed, without prejudice, his petition against the Marsden company, and proceeded with the trial against the appellant.

The appellant complains that the court erred in overruling its motion for a peremptory injunction to the jury at the conclusion of the evidence. In this the appellant is mistaken. There was proof introduced by many witnesses that the landing made by the appellant with its boat was a very unusual, unsafe and dangerous one, and that the force with which it struck the upper end of the wharf-boat forced the separation of the boat and barge just at the moment the de-

ceased was making her step from the one to the other, and caused her death.

The appellant complains that the court failed to give a proper instruction on the question of contributory negligence on the part of the deceased. There is not anything in the record showing the slightest neglect or want of care on the part of the deceased by which she lost her life, and, if the court had failed to give any instruction on this point, it would not have been prejudicial to [868] appellant, as there was no evidence upon which to base it. Appellant also complains of the following words in the first instruction: "And if they shall further believe that said drowning was caused by the negligence in whole or in part of the defendant Louisville and Evansville Mail Company's officers or servants," etc. In the case of Louisville etc. Packet Co. v. Mulligan, 25 Ky. Law Rep. 1287, 77 S. W. 704, the court in discussing an instruction with similar words embodied in it, said: "Appellee, being a passenger on the 'White Dove,' and having no control over the boat, may recover of the 'Cincinnati,' although those in charge of the 'White Dove' were more negligent than those in charge of the 'Cincinnati'; for the negligence of a carrier is not imputed to a passenger who is injured by the concurrent negligence of the carrier and another, and he may recover against both: Danville etc. Co. v. Stewart, 59 Ky. (2 Met.) 119; Louisville etc. R. R. Co. v. Case's Admr., 72 Ky. (9 Bush) 728; 7 Am. & Eng. Ency. of Law, 446, and cases cited. The court, by its instructions, told the jury that both boats were governed by the same rules and regulations. Also that appellant was not liable to appellee unless the plaintiff was injured by reason of the negligence in whole or in part of the officers in charge of the 'Cincinnati.'" The court in that case approved this instruction.

The most serious question involved in this case grows out of an issue made by an amended answer which was filed during the trial in the lower court, in which it was, in substance, alleged that the appellee had, in consideration of one thousand dollars paid to him by the Marsden company, dismissed his action against the Marsden company, this appellant's joint tort-feasor, and had accepted the one thousand dollars in satisfaction of his cause of action; that he had no further right to prosecute his action [869] against this appellant. This was traversed by the appellee, and the proof introduced upon this question showed the following state of facts: The president

of the Marsden company, prior to the convening of the court when the trial was had, desired to avoid further litigation of the matter, and authorized the attorneys for the Marsden company to endeavor to bring about a settlement and compromise of the litigation in so far as it was concerned, and authorized then to pay as much as one thousand dollars, if it took that much, to effect a compromise, and placed this money in a bank subject to the order of its attorneys. These attorneys approached the attorneys for appellee, and made a proposition for a compromise, and eventually offered the one thousand dollars. The attorneys for the appellee refused, stating that, while they believed that the Marsden company was possibly not liable for any negligence—at least they believed its negligence was not as great as that of appellant company's—yet they were afraid, if they accepted this compromise settlement, appellee's right to prosecute the action against the appellant, their joint tort-feasor, would be barred. Thus matters stood until six or seven days after verdict and judgment against appellant, when the attorneys for the Marsden company paid the attorneys for the appellee this money, and they immediately entered a credit upon the judgment against the appellant for this amount of one thousand dollars. We are convinced from all the proof in that case that there was an understanding between the attorneys for the Marsden company and the appellee's attorneys, prior to the trial, that this amount was to be offered and accepted, and the Marsden company was to be released, and the case dismissed against it, and that the dismissal was in conformity with this understanding. The question to be determined is whether this operated as a release of the [870] appellant, it being a joint tort-feasor. Our opinion is that, if the appellee had accepted this one thousand dollars in satisfaction of his cause of action or claim for damages, then it would have operated as a release and a bar to any other proceeding against appellant on account thereof. But it is shown by the proof without contradiction that it was accepted as only part satisfaction, and a release of the Marsden company, but not in satisfaction of his cause of action and claim for damages. It is a universal rule of law that tort-feasors are jointly and severally liable to the injured party. He may sue any one or all, at his election; but when he once receives satisfaction for the injury done him from one or more of the tort-feasors, he is barred from proceeding against the other joint tort-feasors. This is upon the idea

that he is only entitled to one satisfaction, and to avoid his getting more than one compensation for his injury. There are authorities in many states which hold that any satisfaction from and a release of one joint tort-feasor releases all. But on a close investigation of these cases, or at least the most of them, it will be found that they were cases where the proof showed that the injured parties had received full satisfaction for their injuries or cause of action. Such are the cases of Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125; Hubbard v. St. Louis etc. R. R. Co., 173 Mo. 249, 72 S. W. 1073; Brown v. City of Cambridge, 3 Allen, 474; Urton v. Price, 57 Cal. 270; Donaldson v. Carmichael, 102 Ga. 40, 29 S. E. 135; and other cases cited in these opinions. The sole reason given in these opinions for the rule as stated is that it is to prevent the injured party from receiving more than one compensation or satisfaction for his injury. We are unable to understand why a part satisfaction and release of one tort-feasor can be considered as complete satisfaction of his [871] claim for damages, and operate as a bar to his cause of action against the other tort-feasors. There can be no good reason for this. The collection of a part satisfaction from one tort-feasor is a benefit to the others. Under the law there is no right of contribution existing between tort-feasors. The law does not look with favor upon wrongdoers, and they are unlike obligors in an ordinary contract, where the right of contribution is given. The law ought not to be that a release of one tort-feasor, by his making a partial satisfaction for the wrong done, should operate as a release of the other wrongdoers. The law looks with favor upon compromises and settlements. It is not the intention of the law to force people into litigation and prevent settlements out of court. To uphold the rule contended for by appellant, such a result would follow. If ten persons commit a joint tort, and injure a person to the extent of one thousand dollars, and if nine of them recognize that fact, and were willing to pay one hundred dollars each for the purpose of remunerating the injured party and to avoid the expense and annoyance of litigation, and the tenth man refused to pay his one hundred dollars, according to appellant the injured party could not accept the nine hundred dollars in part satisfaction and sue the stubborn tenth man. He would plead the settlement as a satisfaction and a bar. Such a construction of the law would be unreasonable and unjust. All that such a person should be allowed to take

advantage of would be to require that in any judgment that should be rendered against him it should be rendered for one satisfaction of the claim for damages, less any sums that might have been paid by his joint tort-feasors as a partial satisfaction.

In the case of Ellis v. Esson etc., 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518, the court said: "The contract set up in this case shows that the plaintiff did not receive the [872] two hundred dollars from Comstock in satisfaction or as a full compensation for the injury he had sustained by the trespass, and that it was not the intention to release the other joint trespassers from liability for the trespass. The plaintiff's agreement not to sue Comstock for the trespass, under the circumstances disclosed by the evidence in this case, does not, therefore, discharge the other joint trespassers, except pro tanto. The court below properly rendered judgment in favor of the plaintiff for the damages he had sustained by reason of the trespass, less the sum of two hundred dollars received of Comstock. This rule is, we think, supported by the great weight of authority as will be seen by an examination of the large number of authorities cited: Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; McCrillis v. Hawes, 38 Me. 566; Spencer v. Williams, 2 Vt. 209, 19 Am. Dec. 711; Chamberlin v. Murphy, 41 Vt. 110; Sloan v. Herrick, 49 Vt. 327; Matthews v. Chicopee Mfg. Co., 3 Rob. (N. Y.) 712; Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Shaw v. Pratt, 22 Pick. 307; Pond v. Williams, 1 Gray, 630; Catskill Bank v. Messenger, 9 Cow. 37; Line v. Nelson, 38 N. J. L. 358; Rowe v. Thompson, 15 Abb. Pr. 378, 6 Eng. Com. L. 11, 54 Eng. Com. L. 551; Merchants' Bank v. Curtiss, 37 Barb. 319; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504."

Again, in the same case, the court said: "Certainly the receipt of a partial satisfaction from one of two joint tort-feasors is no injury to the other who is afterward sued for the trespass. On the other hand, it is to his benefit, as he has the advantage of what was paid by his associate in the wrong in reducing the judgment against him. The party injured is under no duty to the joint wrongdoer to proceed at all against his associate, and his refusal to proceed [873] against him is no ground of defense. As it is wholly optional with the injured party to proceed against one or two wrongdoers for the whole of his damages, there is no equity in holding that, because he has received a part satisfaction for his injury from

the one not proceeded against upon an agreement not to sue him for the wrong, the other may set up such receipt as a complete defense to the action. He is benefited, and not injured, by such proceeding."

The case of Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140, was one where Chandler and one George Holt committed an assault and battery upon Snow. Holt, being a minor, applied to one White to procure a settlement with Snow for the injury he had received. Snow accepted twenty dollars as part satisfaction of his cause of action and injury, and agreed to look to Chandler for the balance of his compensation. Snow sued Chandler, and this settlement with Holt was pleaded in bar of the prosecution of the action, claiming that the release of Holt released him. The court said: "The evidence is that at the time of receiving the money from Holt the plaintiff declared that he would not settle with Chandler for five hundred dollars. The substance of the arrangement betwixt the plaintiff and Holt seems to have been this: That the plaintiff was willing to receive a small portion of the damage from Holt, either for the reason that he conceived him to be less to blame than the defendant, or that he was less able to pay his proportion of the damage; and on condition of receiving this sum the plaintiff engaged to pursue the defendant for the remainder of his claim. It is clear that the sum paid was not received in satisfaction of the damage, but only in part satisfaction; and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a part satisfaction of the damage, and the plaintiff may sue or omit [874] to sue whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such arrangement. He remains liable for the whole damage until satisfaction is made. If the individual receiving the injury sees fit to visit the penalty upon anyone guilty individual rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve to deter him from such wrongful acts. At the same time any partial payment by a cotrespasser avails so far for his benefit. Such was the ruling in this case. To this extent the defendant can avail himself of plaintiff's arrangement with his cotrespasser, but there was nothing in that contract which constitutes a bar to this suit."

The case of Lovejoy v. Murray, 3 Wall. 1, 18 L. ed., 129, was one in which Murray had recovered judgment on a claim for damages for several thousand dollars, and had received eight hundred dollars thereon. He then sued the other joint wrongdoers, Lovejoy, etc., and they pleaded the judgment and Murray's acceptance of eight hundred dollars thereon in bar of his right to prosecute the action against them. The case was appealed to the supreme court of the United States. In an opinion by Justice Miller the court said: "But in all such cases, what has the defendant in such second suit done to discharge himself upon the obligation which the law imposes upon him to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his cotrespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his cotrespasser, or a release to his cotrespasser, do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done to [875] him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider as such. We are therefore of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not a party to the first judgment."

In the case of Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752, the court said: "As the cause of action is against all the joint trespassers, the plaintiff may sue all or either of them, at his election, and he is entitled to full satisfaction, but he is entitled to but one satisfaction. So, where there are different findings in the same verdict when all the trespassers are sued, the successful party must choose de melioribus damnis. He cannot claim to collect all. It follows, then, if the damages are satisfied in part by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain in the record. And in such case it was but right and proper that the jury should deduct in their finding whatever sum the plaintiff had already received on account of the alleged trespasses from any of the joint parties afterward dismissed. This would be the just application of the

rule that there cannot be a double remuneration for the same wrong."

We have been unable to find where the precise question before us has been considered or passed upon by this court, but the trend of the cases seems to support the conclusion at which we have arrived. The two cases of Bullock v. Beemis, 1 A. K. Marsh. 433, and Calmes v. Ament, 1 A. K. Marsh. 459, [876] in effect decide that in suits on tort, where several are liable, nothing short of a full satisfaction from one will be a bar to further proceedings against the other joint tort-feasors. In the case of United Society of Shakers v. Underwood, 11 Bush, 265, 21 Am. Rep. 214, this court quoted with approval the quotation above from Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129, and then said: "It thus appears that, while the plaintiff may maintain separate actions and recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendant, or, in case no one of them is able or can be compelled to pay the whole of the judgment rendered against him, may accept part satisfaction from one and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered, yet ordinarily, when he has made his election, he will be concluded by it. The recollection of one judgment extinguishes the entire claim for damages." In the case of Sellards v. Zomes, 5 Bush, 90, the court said: "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong. Consequently, since our statute of 1836, authorizing several judgments, a dismission or release of one or more who are sued cannot per se release the others."

In view of the fact that the one thousand dollars received from the Marsden company was received only as part satisfaction of appellee's cause of action, and not in full satisfaction thereof, the appellee was not barred from proceeding further against appellant.

Wherefore the judgment of the lower court is affirmed, with damages.

RELEASING ONE JOINT TORT-FEASOR WITHOUT RELEASING THE OTHERS.

I. Scope of Note, 282.
II. Technical Release—Covenant not to Sue, 282.
III. Reservation in Release of Right to Hold Others, 282.
IV. Satisfaction or Compensation in Full, 284.
V. Satisfaction or Compensation in Part, 285.

I. Scope of Note.

The release of one of several joint tort-feasors as affecting the liability of the others is a theme to which we directed our attention at considerable length in the monographic note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 872-888. Our examination of the authorities at that time revealed some differences of judicial opinion upon certain aspects of the subject, as will appear from a reading of that note; and as there have been several recent adjudications of the courts of last resort on these disputed questions, we have thought it expedient, without re-examining the entire subject, to supplement our former discussion of what may be deemed doubtful propositions in this field of the law, by a consideration of subsequent decisions. And it will be seen, particularly in the light of the more modern adjudications, that the rule that the release of one joint tort-feasor is the release of all, cannot be received without qualification.

II. Technical Release—Covenant not to Sue.

While it frequently is affirmed, as an elementary principle of law, that the release of one of several joint tort-feasors operates to release all the others, yet, if the courts concede this to be true as a general rule, they nevertheless recognize, at least the majority of them do, that the party injured may, in practice and effect, discharge one of the wrongdoers without losing his right of action against the others, provided he does it in the right way. When a technical release, which must be under seal, is given by the injured person to one of several joint tort-feasors, it is quite uniformly held, at least in those jurisdictions where seals are regarded with their ancient sanctity, that this will discharge all, and bar any further remedy for the wrong. The release, being under seal and absolute, cannot, because of the very nature of such technical instruments, be controlled by parol evidence, and the law raises a conclusive presumption that it was given in full satisfaction for the injury, and upon a sufficient consideration. And yet, if the instrument is a covenant not to sue, rather than a technical release, it will operate as a discharge in favor of the party only to whom it is given: See the monographic note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 877, 878. It is well settled that a covenant not to sue one joint tort-feasor does not operate to discharge the others, in the absence of a release or satisfaction in full: See the note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 882; Robertson v. Trammell, 98 Tex. 364, 83 S. W. 1098.

III. Reservation in Release of Right to Hold Others.

The question has arisen in a number of quite recent cases whether a discharge of one joint tort-feasor is a discharge of all, where

the injured person expressly reserves the right to proceed against the remaining wrongdoers, and does not acknowledge full satisfaction for the injury. Some courts have thought that such a discharge of one joint tort-feasor operates as a discharge of the others: McBride v. Scott, 132 Mich. 176, 102 Am. St. Rep. 416, 93 N. W. 243, 61 L. R. A. 445; Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293; note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 882. In our opinion, however, there is no foundation in reason, justice or public policy for such a conclusion.

The court of appeals in New York has declared that if a release of one or more joint tort-feasors contains no reservation, it operates to discharge all; but if the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged: Gilbert v. Finch, 173 N. Y. 455, 93 Am. St. Rep. 623, 66 N. E. 133, 61 L. R. A. 807. This holding has since been followed in Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. Supp. 930; Hirschfield v. Alsberg, 47 Misc. Rep. 141, 93 N. Y. Supp. 617; Carey v. Bilby, 129 Fed. 203, 63 C. C. A. 361.

In the last case cited, Justice Thayer said: "When a release of a cause of action for a tort is given by the injured party to one of two or more persons who committed the wrong, the release is construed most strongly against the party executing it. The law indulges in the presumption that the release was given in full satisfaction for the injury, and upon a sufficient consideration, and will not permit the presumption to be overcome by oral proof to the contrary: Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Bronson v. Fitzhugh, 1 Hill, 185. Sometimes, however, as in the case at hand, a release executed in favor of one wrongdoer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently arisen, How shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrongdoers, or admitting that he has received full compensation for the injury? With reference to this question the authorities are not in accord. Some courts are disposed to hold, and have held, that when such an instrument contains apt words releasing one of the joint wrongdoers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released is repugnant to the release, in that it defeats, or attempts to defeat,

the natural legal effect of the instrument; and that it should therefore be ignored: McBride v. Scott, 132 Mich. 176, 102 Am. St. Rep. 416, 93 N. W. 243, 61 L. R. A. 445; Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293, and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release operating to destroy his cause of action as against all of the joint tort-feasors, but rather as a covenant not to sue the party in whose favor the instrument runs: Gilbert v. Finch, 173 N. Y. 455, 93 Am. St. Rep. 623, 66 N. E. 133, 61 L. R. A. 807; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Sloan v. Herrick, 49 Vt. 327; McCrillis v. Hawes, 38 Me. 566; Price v. Barker, 4 El. & B. 760, 776, 777.

"We are of the opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals or public policy. Besides, we are not aware of any sufficient reason which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept any such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained; that it was not in fact full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey."

IV. Satisfaction or Compensation in Full.

If one who has suffered an injury at the hands of two or more joint tort-feasors accepts compensation from one of them as payment and satisfaction in full for the wrong, and thereby discharges him from further liability, the other wrongdoers are also discharged from responsibility. The injured person is thus prevented from obtaining more than one compensation or satisfaction for his injury. He may hold any one or all of the joint tort-feasors liable, but he

is entitled to only one satisfaction or compensation; and when he receives that in full from one of the wrongdoers, the others are discharged, and he cannot pursue them with legal process: See the monographic note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 874, and the recent cases of Jones v. Chism, 73 Ark. 14, 83 S. W. 315; Hubbard v. St. Louis etc. R. R. Co., 173 Mo. 249, 72 S. W. 1073; Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125; Burns v. Womble, 131 N. C. 173, 42 S. E. 573; Dufur v. Boston etc. R. R. Co., 75 Vt. 165, 53 Atl. 1068.

V. Satisfaction or Compensation in Part.

Some authorities seem to hold that any satisfaction from and a release of one joint tort-feasor will discharge the others, without regard to whether the satisfaction is in full: See McBride v. Scott, 132 Mich. 176, 102 Am. St. Rep. 416, 93 N. W. 243, 61 L. R. A. 445; Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293. No valid reason is apparent, however, why receiving partial satisfaction from one joint wrongdoer and releasing him can affect the others, except to reduce the amount of a recovery against them. If the injured person receives part of the damages to which he is entitled, from one of the wrongdoers, the receipt thereof not being understood to be in full compensation of the injury, he does not thereby discharge the others, except pro tanto: See the monographic note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 874, 875; Miller v. Beck, 108 Iowa, 575, 79 N. W. 344; Carey v. Bilby, 129 Fed. 203, 63 C. C. A. 361. This is the doctrine announced by the Kentucky court in the principal case, and this case has already been approved in Mississippi and in Texas.

In Bailey v. Delta Elec. etc. Co., 86 Miss. 634, 38 South. 354, where an employé had been injured by the concurring negligence of his employer and another, and had received partial satisfaction from the employer, the court said: "Under this state of facts, the partial satisfaction for the injuries received by the servant made by the master, not intended to be a settlement in full, and not received as, nor in fact being, full compensation, cannot inure to the other person whose concurrent negligence caused the injury. We are not unmindful that in many jurisdictions it is held that any release of one tort-feasor operates to absolve all others from liability. We prefer, however, to adopt the reasoning of that other numerous line of decisions which holds that, in order for such release to have this legal effect, the satisfaction received by the party injured must be intended to be, and accepted as, full compensation for all injuries inflicted. This is more in accord with justice and in better harmony with the principles of enlightened jurisprudence, which will not permit a party suffering a wrong to be deprived of his right to redress by any purely technical reasoning. We refer specially, as

supporting this conclusion, to the strongly reasoned case of Louisville etc. Mail Co. v. Barnes, 117 Ky. 860, ante, p. 273, 79 S. W. 261, 64 L. R. A. 574, where the whole subject is exhaustively discussed, and the true rule clearly and definitely set out."

In Robertson v. Trammell (Tex. Civ. App.), 83 S. W. 258, the case of Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293, is expressly disapproved, and the above decision of the court of appeals of Kentucky followed.

In the course of a thorough examination of the question, Justice Eidson said: "It is a universal rule of law that joint tort-feasors are jointly and severally liable to the injured party, and he may sue any or all, at his election; but when he once receives satisfaction from any one or more of the joint tort-feasors, he is precluded from proceeding against the others, or any of them. The essential principle involved is the right of the injured party to satisfaction for the injuries sustained. If there is a satisfaction of the cause of action or claim for damages, although the release is given to one, or any number less than all, it constitutes a release of all; but a part satisfaction cannot, in morals or law, constitute full satisfaction. A part is not equivalent to the whole. While it is true there is, to some extent, a conflict in the decisions, some holding directly, as is held in Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 92 Am. St. Rep. 864, 68 Pac. 954, 58 L. R. A. 293, that a release of one joint tort-feasor, independent of the question of full satisfaction, releases all, in our opinion the weight of authority and the sounder reason favor the doctrine that the instrument relied upon to operate as a release of the joint tort-feasors not included within its terms must show a release of the cause of action or a full satisfaction of the claim for damages." This case was affirmed by the supreme court of Texas in Robertson v. Trammel, 98 Tex. 364, 83 S. W. 1098.

It has been suggested that this doctrine is not so applicable to cases of injury to the person or reputation of an individual as to cases of injury to property, for in the former there is greater uncertainty as to the true measure of damages: See the monographic note to Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 875, 876. "Some of the decisions," to quote from Robertson v. Trammell (Tex. Civ. App.), 83 S. W. 258, 1098, "seem to make a difference between a trespass upon property and one upon the person, holding that in the former class of cases, the amount of damages being the subject of proof and computation, a release of one joint tort-feasor does not necessarily release the others; but in the latter class of cases, the amount of damages not being the subject of proof and compensation, but resting mostly in the discretion of the court and jury, any sum received by the injured party from one of the wrongdoers should be considered full compensation for the injury sustained. We are unable to perceive the soundness of this doctrine. The object and purposes of a suit in either class of cases is to recover satisfaction

for the injury sustained, and not simply to render certain the amount of the damages. We heartily concur in the following language in Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129, in discussing a case holding the doctrine referred to: 'If the only object, or, indeed, the principal object, in obtaining a judgment in trespass was to render certain the extent of plaintiff's injuries, or the amount of damages which would compensate for those injuries, we might be able to comprehend the force of this logic. But as it is the purpose of the law, and the main purpose for which courts of justice are instituted, to procure satisfaction for these injuries, we do not see the sequence of the reasoning of the learned judge.' We regard the case of Louisville etc. Mail Co. v. Barnes, 117 Ky. 860, ante, p. 273, 79 S. W. 261, 64 L. R. A. 574, as being directly in point upon the question here involved, and as being a correct enunciation of the principle that should control in reference to the character of releases now under consideration."

GERMAN GYMNASTIC ASSOCIATION v. LOUISVILLE.

[117 Ky. 958, 80 S. W. 201.]

TAXATION—What is an Educational Institution.—A gymnastic association where regular gymnastic exercises are taught and a teacher in physical culture constantly employed is an institution of education, within the meaning of a constitutional provision exempting institutions of education from taxation. (p. 289.)

Ernest Macpherson, Lewis N. Dembitz and George A. Brent, for the appellant.

H. L. Stone, city attorney, for the appellee.

960 PAYNTER, J. The German Gymnastic Association of Louisville is a corporation by virtue of the act of the General Assembly of this commonwealth approved March 4, 1854. It owns real property in the city of Louisville of the value of fifteen thousand dollars, where regular gymnastic exercises are taught. A teacher in physical culture is constantly employed, who instructs the members, and also one day of the week is devoted to the teaching of branches ordinarily taught in schools. Lectures and addresses are delivered, and occasionally discussion of timely topics take place. The association is maintained by the payment of monthly dues by the members. There are no shares of stock, and no one derives

any pecuniary benefit from the association. Section 170 of the constitution provides that "institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," shall be exempt from taxation. It is claimed that appellant is exempt from taxation by virtue of this provision of the constitution. If it [961] was conceded to be an institution of education, it would not be exempt from taxation if it was used or employed for gain. The record shows that it was not so employed, so the only question to be answered is, Is it an institution of education? Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to perfect education. The framers of the constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength. This is of as much importance to the state as is the acquisition of a knowledge of Latin, Greek, mathematics, etc.

In Mt. Hermon Boys' School v. Gill, 145 Mass. 139, 13 N. E. 354, the court said: "Education may be particularly directed to either the mental, moral, or physical faculties, but in its broadest and best sense it relates to them all." In Ruohs v. Backer, 6 Heisk: 395, 19 Am. Rep. 598, the court said: "In its broadest sense the word 'education' comprehends not merely the instruction received at school or at college, but the whole course of training, moral, intellectual or physical." In People v. Barber, 42 Hun, 27, the court said: "Suitable recreation and physical exercise are deemed requisite to health and successful culture." If one institution [962] afford an opportunity to acquire this perfect education, it is one of education. If three institutions are organized—one seeking by a course of instruction to cultivate the mind, one by a method of instruction to improve students' religious or moral conditions, and another to teach physical culture to produce

a better physical development, each is an institution of education, as much as the one at which the student can acquire the threefold knowledge. It is simply a matter of judgment or convenience, on the organization of institutions of education, whether one shall furnish all the opportunities for the acquisition of an education or whether there shall be separate institutions for that purpose. Our conclusion is that the appellant is an institution of education, not employed for gain, and is exempt from taxation.

The judgment is reversed for proceedings consistent with this opinion.

Chief Justice Burnam and Judge Hobson dissent.

The Exemption from Taxation of property devoted to educational, religious and charitable purposes, is discussed in Green Bay Lodge v. Green Bay, 122 Wis. 452, 106 Am. St. Rep. 984; Commonwealth v. Young Men's Christian Assn., 116 Ky. 711, 105 Am. St. Rep. 234; Hibernian Ben. Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769; Philadelphia v. Masonic Home, 160 Pa. St. 572, 40 Am. St. Rep. 736.

MANN v. COMMONWEALTH.

[118 Ky. 67, 80 N. W. 438.]

CRIMINAL LAW—Jeopardy—Separate Offenses.—The burglarious entry of a house and the shooting of the owner thereof therein by the same person after the burglarious act has terminated do not constitute a single transaction out of which two offenses cannot be carved so as to render a conviction for the shooting a bar to a prosecution for the burglary. (p. 291.)

CRIMINAL LAW—Jeopardy—Separate Offenses.—A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had. (pp. 292, 293.)

J. M. Collins, for the appellants.

N. B. Hays and L. Mix, for the commonwealth.

69 HOBSON, J. Appellants, Thomas Mann and Edward Morris, were indicted and convicted of burglary, their punishment being fixed at confinement in the penitentiary for ten years. The proof shows that they, in company with one Charles Sanders, went from Maysville in a buggy about ten

miles to the house of John B. Farrow, or near it, and there tied their horse, and after entering the house through the window, in the night-time, proceeded to rob Farrow by taking some money that was in his pants pocket. Some noise they made waked up Mrs. Farrow, who roused her husband, and thereupon the defendants or one of them, shot Farrow in the arm, and also in the back. The same grand jury that found the indictment for burglary also found an indictment against them for shooting Farrow, and on this last indictment they were tried and convicted. Mann appealed to this court, and that judgment was affirmed: Mann v. Commonwealth, 25 Ky. Law Rep. 1964, 79 S. W. 230. When arraigned on the charge of burglary, they pleaded the conviction under the indictment for the shooting of Farrow, in bar of the proceeding.

While the indictment on the charge of burglary contains some unnecessary averments as to the larceny committed by them after they entered the house, it is a charge only of burglary, the allegations as to the stealing of the money by putting Farrow in fear and shooting him being apparently only added to illustrate the felonious intent with which the defendants entered the house as charged in the indictment. burglary was complete when the felonious entry was made, and the defendants might have been indicted and convicted [70] therefor, although they had stolen nothing in the house, or committed no other crime after they entered it. The allegations, therefore, of the indictment, as to what they did after they entered the house, are surplusage, although the facts so alleged might be properly given in evidence before the jury, on the trial, to show the intent with which the entry was made. These averments are simply statements of evidential matter, which should have been omitted from the indictment.

Burglary is defined as "the breaking and entering in the night of another's dwelling-house, with intent to commit a felony therein": 1 Bishop's Criminal Law, sec. 559. "If a man in the night-time breaks into a dwelling-house, intending to commit therein some act which in the law is felony, he is guilty of burglary, whether he succeeds in doing what he meant or not": 1 Bishop's Criminal Law, sec. 437. It is insisted, however, for appellants that the defendants entered the house to steal the money, and that the entry of the house, the stealing of the money, and the shooting of Farrow were all one transaction, done in pursuance of one intent, and that out of it the commonwealth cannot carve two offenses. In

support of this view we are referred to a number of authorities. Thus in Fisher v. Commonwealth, 64 Ky. 211, 89 Am. Dec. 620, where the defendant by the same act and with the same intent took a horse, wagon, and harness, it was held that an acquittal of stealing the horse was a bar to an indictment for the stealing of the wagon and harness, and the rule was applied that out of one transaction committed with the same intent two offenses could not be carved. The same rule was applied in Triplett v. Commonwealth, 84 Ky. 193, 1 S. W. 84, where an acquittal of the offense of burglary was held a bar to a prosecution for a larceny forming part of the [71] same transaction. The court said: "At common law, in an indictment for burglary, a count might be added for the larceny when there had been an actual taking, and it therefore resulted that an acquittal of the burglary with intent to steal constituted no bar to a prosecution for the actual theft. Without the intention to commit a felony, the mere fact of breaking would not, at common law, constitute a burglary; and when the intent to steal is charged and the party acquitted, it would seem that a subsequent indictment for grand larceny, with the same fact developed on the trial, would be placing the accused in jeopardy the second time for the same offense. The weight of authority, we are aware, is adverse to such a view of the question, but the whole reason and philosophy of the law, as well as justice to the accused, require a different ruling."

In Herera v. State, 35 Tex. Cr. App. 371, 34 S. W. 943, it was held by the Texas court that a conviction for assault with intent to kill was a bar to an indictment for robbery committed in the same transaction. But none of these cases are precisely in point here. It is misleading to say that the shooting of Farrow and the burglarious entry of the house were committed in the same transaction, in the sense in which this term is used by the authorities: See 1 Bishop's Criminal Law, sec. 1060. Thus in the Fisher case the one act of the defendant was the taking of the horse, wagon, and harness; but here there were two acts of the defendant—the burglarious entry of the house and the shooting of Farrow in the house after this act had terminated. These are no more one transaction than if the defendants had successively shot two different persons in the same difficulty. The shooting of Farrow could not have been set out in a second part of the indictment for burglary, or joined with that

charge. The robbery of the person by putting [72] him in fear was not complete before the assault with intent to kill was committed; so, therefore, neither the Triplett case nor the Herera case applies. In the case before us the entry into the house was for the purpose of theft. The shooting of Farrow came about because he waked up, and was nothing more than a new offense which the commission of the offense intended induced the defendants to commit. It is no more one transaction than it would be if the defendants had set fire to the house, after robbing it, to conceal the evidence of their crime, or had shot Farrow's son as they escaped, to prevent his being a witness against them.

In Teat v. State, 53 Miss. 439, 24 Am. Rep. 708, two men were wounded mortally by two almost simultaneous shots fired by the defendant and another, lying in ambush. It was held that a conviction for the killing of one of the men was not a bar to an indictment for the killing of the other. In State v. Nash, 86 N. C. 650, 41 Am. Rep. 472, the defendant fired twice in quick succession upon a crowd of persons, wounding one at the first shot and another at the second. It was held that a conviction for the wounding of the first was not a bar to an indictment for the wounding of the second. In Jones v. State, 66 Miss. 380, 14 Am. St. Rep. 570, 6 South. 231, the defendant wounded two men in the same difficulty. The conviction for one was held no bar for a prosecution for the other. To same effect are McCoy v. State, 46 Ark. 141; Augustine v. State, 41 Tex. Cr. App. 59, 96 Am. Rep. 765, 52 S. W. 77; Winn v. State, 82 Wis. 571, 52 N. W. 775; Greenwood v. State, 64 Ind. 250; Ashton v. State, 31 Tex. Cr. Rep. 482, 21 S. W. 48; Samuels v. State, 25 Tex. App. 537, 8 S. W. 656. Other cases are also collected in a note to State v. Nash, 86 N. C. 650, 41 Am. Rep. 472. Referring to this line of cases, Mr. Bishop, in the last edition of his work on Criminal Law, section 1061, says: "Obviously, there is a difference between one volition and one transaction. [73] And, on a view of our combined authorities, there is little room for denial that in one transaction a man may commit distinct offenses of assault or homicide upon different persons and be separately punished for each." So in American and English Encyclopedia of Law, volume 17, page 603, it is said: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to

them on the trial for the one of them first had." It has been held that, if a man burns a dwelling-house and thereby takes the life of one of the inmates, he cannot, after being convicted of arson, be also convicted of murder; and so it has been held that if a man by the same blow wounds two men, or kills two by the same discharge of a gun, a conviction for the wounding or killing of one will bar a prosecution for the wounding or killing of the other; but on this subject the authorities are divided: Bishop's New Criminal Law, secs. 1058-1061. The ruling in the arson case is put on the ground that the force which the defendant started destroyed the house and killed the person without any further action or new impulse from him. The ruling in the cases where two persons are wounded or killed by the same act is put in part on the ground that the wounding or killing of both might be charged in one indictment, and in part on the ground that there was no new impulse or act on the part of the defendant. But in the case before us the defendant could not be prosecuted under one indictment for the burglary and the shooting of Farrow. Here there was a new volition on the part of the defendant, and a new force set in motion by him, after the burglary was complete. If he cannot be prosecuted in separate indictments for the two offenses, it results that although he committed both, one [74] beginning after the other was committed, and being the result of a separate volition as well as a new force, the constitutional provision forbidding his being twice punished for one offense will operate to shield him from punishment for a separate and independent offense simply because it was followed in close succession by another offense which he committed.

Judgment affirmed.

Whole court sitting.

The Identity of Offenses in a Plea of Former Jeopardy is the subject of an extended monographic note to People v. McDaniels, 92 Am. St. Rep. 89-159.

GEORGETOWN TELEPHONE COMPANY v. McCULLOUGH.

[48 Ky. 182, 80 S. W. 782.]

NEGLIGENCE—Proximate Cause.—Independent Acts of a responsible person intervening between the defendant's negligence and the injury sustained, break the causal connection between the negligence and the damage, and he who is guilty of the original negligence is not chargeable, but redress must be had from him who directly caused the injury, unless the intervening act is such as might reasonably be anticipated as the natural and probable result of the original cause. (pp. 298, 299.)

NEGLIGENCE—Proximate Cause—Injury from Explosive.—If a telephone company rents two rooms in a building, using one of them as an operating-room, and the other as a storeroom, where it has some dynamite stored, and the owner of the building employs a carpenter to put up a partition next to such storeroom, in doing which he or his assistant necessarily removes the dynamite and places it in the hallway near such operating-room, where from some unknown cause it is exploded, injuring an employé of the telephone company in the operating-room, the company is not liable for the injury, as the proximate cause thereof was the negligence of the carpenter or his assistant in placing the dynamite where he did, and not the negligence of the company in placing it in its storeroom. (p. 299.)

V. F. Bradley, for the appellant.

Montgomery & Lee, for the appellee.

184 BARKER, J. The Georgetown Telephone Company is a corporation operating a telephone line in Georgetown, Kentucky. It occupied, at the time of the accident involved herein, two rooms in a building owned by Herring, Jenkins & Co., on the south side of Main street. The front of these two rooms was used as an operating room, while the back room was used for storing the materials used by the corporation in its business. The decedent, Mary McCullough, was one of the operators employed by the 185 corporation, and her place of business was in the front room. The two rooms opened into a hall common to all the tenants of the owners of the building. On the seventh day of January, 1903, the owners of the building, Herring, Jenkins & Co., employed a carpenter—one Cleary—to partition off a bathroom next to the storeroom of appellant; and, in order to do this, it was deemed necessary to move some shelves, and their contents, in the wareroom of appellant. In preparing to do this Cleary found upon one of the shelves a box full of dynamite, there

being probably six or seven pounds of this explosive. Fearing that it might explode, he requested a young man by the name of Loots, who occasionally worked for appellant, but who was not then in its employ, to remove the dynamite from the shelves. This Loots refused to do, whereupon Cleary ordered one Goddard, who was in his own employ as assistant, to remove it. Goddard did so, taking the box from the shelf where it had been, and carrying it out into the common hallway, where he placed it in a corner near the front door of appellant's operating-room. Here, from some unknown cause it was exploded. Just immediately before the explosion, appellee's decedent was standing on the inside of the door of the operating-room, leading into the hallway, with her hand upon the door knob. When the explosion took place, the concussion blew in the door with such force as to throw her across the room, smashing and breaking her arm, from which injury she afterward died. Appellee, having qualified as the administrator of her estate, instituted this action to recover damages for her death, alleging that it was caused by the negligence of appellant in failing to furnish a safe place for her to work. The answer controverted all of the material allegations of the petition, and thus completed the issues. The trial resulted in a verdict for appellee in the sum of four thousand nine hundred and eighty-four dollars and thirty-three cents.

186 The first question that meets us on this appeal is whether or not appellant was entitled to a peremptory instruction upon the evidence establishing substantially the foregoing facts. Assuming, for the purposes of this case, that it was negligence in appellant to keep the dynamite in question in the back part of its storeroom, does it therefore follow that it is responsible for the accident by which the decedent was injured? It is neither alleged nor proved that Cleary was in the employ of appellant, or that he went into its wareroom by its knowledge or consent, or that it knew or approved in any way of the removal of the dynamite from the shelf in the wareroom to the corner in the hall. The only person other than Cleary and his assistant who seems to have known of the removal of the dynamite was young Loots, who occasionally worked for appellants as assistant to one of its employés, but who on the day in question was not in its employ. And it does not appear that he even knew where the dynamite was placed when it was removed from the shelf. That the dyna-

mite, when placed in the public hall, was in a very much more exposed and dangerous place than when on the shelf of appellant's wareroom, is too obvious to require demonstration. But that it was, shortly after being placed there, ignited by, perhaps some one throwing into the box a lighted match, or the stump of a cigar, or cigarette, shows this to be true, if evidence on this point is needed. It does not follow that, because one is negligent and an accident occurs, therefore the author of the negligence is liable in damages. The negligence must be the proximate cause of the injury, in order to establish liability.

Shearman and Redfield, in their work on Negligence, fifth edition, section 25, say: "The fact that the defendant has been guilty of negligence followed by an accident does not make him liable for the resulting injury, unless [187] that was occasioned by the negligence. The connection of cause and effect must be established. And the defendant's breach of duty, not merely his act, must be the cause of the plaintiff's damage. The defendant's negligence may put a temptation in the way of another person to commit a wrongful act, by which the plaintiff is injured, and yet the defendant's negligence may be in no sense a cause of the injury." In section 26 it is said: "The proximate cause of an event must be understood to be that which, in a natural and continual sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity or causation; that is, the proximate cause which is nearest in the order of responsible causation." In section 32 the authors say: "The connection between the defendant's negligence and the plaintiff's injury may be broken by an intervening cause. In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one if it is the culpable act of the human being who is legally responsible for such act. The defendant's negligence is not deemed the proximate cause of the injury when the connection is thus actually broken by a responsible intervening cause."

The case of Bosworth v. Brand, 1 Dana, 377, was an action in which Brand obtained a verdict and judgment against Bosworth for the value of a slave killed on Bosworth's farm at a negro frolic or dance. It seems that Bosworth permitted [188] some fifty negroes to assemble and dance at an outhouse; "that a patrolling party surrounded the house about midnight for the purpose of apprehending the negroes and breaking up the frolic; that the negroes refused to surrender when called upon so to do, and endeavored to make their escape; that one of the patrol, without any necessity for so doing, wantonly fired a pistol loaded with balls and buckshot into a dark room crowded with negroes, and thereby killed the slave of Brand." It was unlawful for Bosworth to permit the negroes to assemble in the manner in which they did, and the court said: "That this act renders the conduct of Bosworth illegal, in permitting the assemblage of the negroes, and that it renders him liable to the penalty therein named to be recovered in the manner therein prescribed, there is no doubt. But that he is liable for every accident or injury happening to the slaves of others whilst so assembled, or in going to or coming from his farm, is an inference by no means so obviously deducible therefrom. It is true, in general, that a man is entitled to reparation for every damage he sustains from the unlawful action or omission of another. But the damages must be the direct and immediate, or at least proximate and natural, consequence of the act or omission complained of. It will not do to carry it to every consequence, however remote, which can be traced to the particular action or omission, and much less to such things as are not a natural consequence, and may have arisen from other and extraneous causes. Thus it is said (Buller's Nisi Prius, 25) 'that if one whip my horse, whereby he runs away with me, and runs over a man, he may have an action against such person, for the whipping was an act of folly, and he ought to be answerable for the consequences. A fortiori, I might maintain an action, if I received any hurt, because the consequence is more natural. He also suggests the propriety of proving in such [189] cases that the injury was such as would probably follow from the act done. 'So, also,' he says, 'if a man lay logs of wood across a highway, whereby my horse stumbles and flings me, I may bring an action, for, whenever a man sustains a particular injury by a nuisance, he may maintain an action; but then the injury must be direct, and not consequential, as

by being delayed in a journey of importance.' For which he cites Carthew, 194, 451. Pothier, in his treatise on Obligations, page 97, says: 'If a man sells me a cow which he knows to be infected with a contagious distemper, and conceals it from me, he is responsible for the damage I suffer, not only in that particular cow, but also for my other cattle to which the distemper is communicated.' But he says, if the loss of his cattle prevented him from raising a crop, which prevented him from paying his debts, and his creditors in consequence seize his property and sell it much below the value, that, these consequences being too remote, the fraudulent vendor is responsible for none of them. Suppose the slave of one goes to the farm of another, and is not driven away in the time prescribed by the above-cited act; that in consequence he is overtaken on his return home by a hurricane, and killed by the falling of timber, or is accidentally shot, or even whilst remaining after the prescribed time he is accidentally killed; could the owner of the slave recover his value from the owner of the farm? Or, to take a case under another clause of the statute, that slave enters a tippling-house, and purchases a dram, and whilst in the act of drinking it he is accidentally or designedly shot by some one from without the house; would the seller of the dram be responsible for the value of the slave? It seems to us that all these propositions must be answered in the negative, and that the contrary opinion has no plausible foundation in either law or justice."

In the case of Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 190 19 L. ed. 65, the rule as to proximate cause is thus stated by Mr. Justice Miller: "One of the most valued criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of misfortune, the other must be considered as too remote."

In the case of McGahan v. Indianapolis Natural Gas Co., 140 Ind. 335, 49 Am. St. Rep. 199, 37 N. E. 601, 29 L. R. A. 355, the gas company had negligently permitted one of its pipes to become defective, whereby McGahan's house became filled with it, whereupon he employed a plumber to examine the house for the cause of the leakage. The plumber went into the room with a lighted lamp, thus causing an explosion. It was held that the negligence of the plumber, and not that of the gas company, was the proximate cause of

the injury, and in the note to this case it is said: "When the independent act of a responsible person intervenes between the defendant's negligence and the injury sustained, such act breaks the causal connection between the negligence and the damage, and he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury, unless the intervening act is such as might reasonably be anticipated as the natural or probable result of the original cause": See, also, Reid v. Evansville etc. R. R. Co., 10 Ind. App. 385, 53 Am. St. Rep. 391, 35 N. E. 703.

Applying the principle enunciated in the foregoing authorities, we have no hesitancy in reaching the conclusion that the act of Cleary and Goddard in removing the dynamite from its comparatively safe position on the shelf in the appellant's wareroom to the exposed position in the public hall was the proximate cause of the explosion which resulted in the injury [191] complained of. Suppose Goddard, under the instructions of Cleary, had taken the dynamite out on the public street and placed it at the door of an adjoining building, and it had there been ignited and exploded, just as it was in the hall by appellant's door; would it be contended then that appellant was responsible for any damage arising from this wrong? We think not. As said before, neither Cleary nor Goddard was in the employ of appellant, nor were they, so far as this record discloses, acting with its approval. So far as the evidence shows, they were trespassers in the wareroom where the dynamite was, and wrongdoers in removing it at all. According to the evidence, as shown in this record, what defense could Cleary and Goddard have offered had they been sued for their wrongful act in removing the dynamite to the hall? Certainly, between the original negligence—if such it be—of appellant in permitting the dynamite to remain on the shelf in its wareroom, and the injury of the decedent, they intervened as responsible causal agents, and their wrongful act was the direct and proximate cause of the injury inflicted.

The court should have sustained appellant's motion for a peremptory instruction. Wherefore the judgment is reversed, for proceedings consistent with this opinion.

The Proximate Cause of an injury is the superior or controlling agency as distinguished from those causes which are merely incidental or subsidiary to the controlling or principal cause. The proximate cause, however, is not always that which is nearest in

time or place to the injury: Snyder v. Philadelphia Co., 54 W. Va. 149, 102 Am. St. Rep. 941, and cases cited in the cross-reference note thereto; Chattanooga Light etc. Co. v. Hodges, 109 Tenn. 331, 97 Am. St. Rep. 844; Anderson v. Schurke, 121 Iowa, 340, 100 Am. St. Rep. 358. A cause is not too remote merely because it produces the damage by means of an intermediate agency, human or otherwise: Cohn v. May, 210 Pa. St. 615, 105 Am. St. Rep. 840; Skinn v. Renter, 135 Mich. 57, 106 Am. St. Rep. 384; Burk v. Creamery Package Mfg. Co., 126 Iowa, 730, 106 Am. St. Rep. 377. For an extended discussion of the doctrine of proximate and remote cause, see the monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807-861.

GALLOWAY v. DURHAM.

[118 Ky. 544, 81 S. W. 659.]

WILLS—Estate Conveyed.—Under a will by which a testator gives his property to his sister, and provides therein that if she should die without issue and leave any of the property, it shall go to another, the sister takes an absolute fee simple, with full power to sell and convey a perfect title. (p. 301.)

R. L. Greene and H. C. Martin, for the appellants.

S. M. Payton, for the appellee.

545 BURNAM, C. J. This action was brought in the Hart circuit court for a construction of the seventh clause of the will of George C. Brooks, which is as follows: "That all the balance of my property, real, personal and mixed, go to my sister, Susan Brooks; and that she have same; but should she die without issue and leave any of the property at her death given her by this will, then in that event, my sister Sallie Galloway and her children have said property." After the probation of the will Susan Brooks was married to J. R. Durham, and it is her contention that she takes an absolute fee simple title in the real estate, with power to sell and convey a perfect title. The defendants, in their answer, claim that plaintiff's interest in the property was a defeasible fee, subject to be defeated by her death without issue. It was adjudged by the lower court that plaintiff was the owner in fee simple of the several tracts of land which she took under the will, and that she had the right to sell and convey a fee simple title thereto, and that defendants, Sallie Galloway and her children, took no vested interest in the remainder thereunder, and they have appealed.

The decision of the question arising upon the appeal turns
546 upon the meaning which is to be given to the words: "But should she die without issue, and leave any property at her death given her by this will, then, in that event, that my sister Sallie Galloway and her children have said property." Whilst the clause of the will under consideration does not in express terms confer upon appellee the power to sell and convey the real estate therein devised, this follows by necessary implication, if we are to attach any meaning to the words "leave any of the property at her death given by this will." And it is a well-settled rule of construction of wills that an estate may pass by mere implication without any express words to direct its course: See 2 Blackstone's Commentaries, 381. "Necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed": 1 Ves. & B. 468. We therefore conclude that testator intended to invest the appellee with the right, if she saw fit, to appropriate the entire estate which passed to her under the seventh clause of his will, if she so desired, and the power to sell and convey for this purpose is necessarily inferred. This being true, it follows, under numerous decisions of this court, that appellee became thereby invested with the fee, and with full power to convey a fee simple title. This question is fully considered and discussed in Barth v. Barth, 18 Ky. Law Rep. 840, 38 S. W. 511; Clay v. Chenault, 108 Ky. 77, 21 Ky. Law Rep. 1485, 55 S. W. 729; Ray v. Spear's Exr., 23 Ky. Law Rep. 1338, 65 S. W. 867; Cox v. Anderson's Admr., 24 Ky. Law Rep. 721, 69 S. W. 953; Humphrey v. Potter, 24 Ky. Law Rep. 1264, 70 S. W. 1062. And these decisions are in conformity with the public policy of the state as announced in section 2342 of the Kentucky Statutes of 1903.

For reasons indicated, the judgment is affirmed.

A Devise by a Man to His Wife which does not in express terms give her the fee, nor expressly or impliedly give her power to dispose of the property, and which gives the property to his son after his death, passes only a life estate to her: Pate v. Bushong, 161 Ind. 533, 100 Am. St. Rep. 287. See, too, Defreese v. Lake, 109 Mich. 415, 63 Am. St. Rep. 584; Waller v. Martin, 106 Tenn. 341, 82 Am. St. Rep. 882. A power of sale added to a life estate does not raise it to a fee: Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Mansfield v. Shelton, 67 Conn. 390, 52 Am. St. Rep. 285. A clause in a testator's will leaving his property to his wife "to be sold, retained and exchanged, used and managed by her as she may think proper, during her life, and in case anything may be left after her

death, she shall make some arrangement to have it equally divided among our children," is held to pass a life estate to the wife, with remainder to the children, but with power in her to dispose of the fee: Skinner v. McDowell, 169 Ill. 365, 61 Am. St. Rep. 183.

FIDELITY TRUST COMPANY v. LOUISVILLE GAS COMPANY.

[118 Ky. 588, 81 S. W. 927.]

CORPORATIONS—Right to Contract Debts and Borrow Money. Corporations, other than those organized for governmental purposes, have the right to contract debts, borrow money and give the customary evidences of debt and the customary security therefor. Such power is only limited by statute, or the provisions of their charters, and need not be expressly granted. (p. 304.)

CORPORATIONS—Powers—Right to Guarantee Bonds.—Although the charter of a gas company provides that it may issue bonds for a certain sum and execute a mortgage to secure them, this does not so limit the power of the corporation to contract indebtedness as to prevent it from guaranteeing the payment of bonds worth a much larger sum, sold by it after it has lawfully acquired them in the conduct of the business for which it was organized. (pp. 306, 307.)

Du Relle & McHenry, Strother & Hardin, for the appellants.

Humphrey, Burnett & Humphrey, for the appellee.

590 PAYNTER, J. The matter in controversy is as to the right of the Louisville Gas Company to guarantee certain bonds of the Louisville Lighting Company, which the first-April 591 26, 1890, and the other May 3, 1890. By the chartered by an act of the legislature approved March 16, 1888. There are two acts amendatory of its charter one approved April 591 26, 1890, and the other May 3, 1890. Blt the charter the gas company's capital stock may be $4,000,000, and all of it has been sold, except $400,000. So it will be seen that its capital stock is $3,600,000. Pevious to the enactment of the amendments to its charter, it was supplying the city of Louisville and the citizens thereof with gas. The city of Louisville owns about one-fourth of the capital stock of the gas company. There being a demand that the city be lighted with electricity, the city and the gas company joined in a request to the legislature to pass the amendatory acts. By section 1 of the act approved May 3, 1890 (Acts 1889-90, p. 128, c. 1266), it is pro-

vided that "the general council of the city of Louisville and the board of directors of the Louisville Gas Company having assented thereto, that the act entitled 'An act to incorporate the now existing Louisville Gas Company and grant it a new charter,' be and it is hereby amended as follows: The said company shall have all the power and authority necessary for the manufacture, distribution and sale of electricity for illumination; and to that end may purchase, hold, and sell all real and personal property, including stock in other companies, necessary or convenient to the conduct of such business." By virtue of this provision of the charter the plaintiff bought the stock of a corporation called the Louisville Electric Light Company. It expended in the purchase of land and the erection of an electric light plant more than $1,200,000. Afterward the electric light company by lawful authority consolidated with the Citizens' Electric Light Company, and the name of the company formed by the consolidation of the two companies is the Louisville Lighting Company. As a result of and as a consideration for the consolidation, the gas company received $1,600,000 of the bonds of the Louisville Lighting Company, and they are secured by a [592] mortgage. The right of the gas company to acquire and own the $1,600,000 of bonds is not questioned. In the erection of the electric light plant and otherwise, the gas company contracted a debt of about $800,000, about $770,000 of which is due the Fidelity Trust Company, the National Bank of Kentucky, the German Bank, and the German Insurance Bank. The gas company desired to discharge its indebtedness, and the institutions named agreed with the gas company to take the lighting company's bonds at $1.02 sufficient to discharge their debts. The gas company agreed to make a guaranty on the bonds as follows to wit: "For value received the Louisville Gas Company hereby guarantees the payment of all coupons on this bond maturing on or prior to October 1, 1918, as and when the same may mature. It further agrees to purchase this bond at par on October 1, 1918, if so requested, by the holder, not less than sixty days prior thereto." The question having arisen as to the right of the gas company to deliver the bonds with the above guaranty, this action was instituted to have the question determined.

The Louisville Gas Company is a trading corporation, its chief business being to manufacture and sell gas and electricity. The rule is well recognized that corporations, other

than those organized for governmental purposes, have the right to contract debts or borrow money for the purpose of accomplishing the purposes of their organization. This power exists, although not expressly granted by their charters, as fully as possessed by individuals. They also have the power to give the customary evidences of debt, and the customary security therefor. This power is only limited by provisions of their charters or statute. It would be a meaningless thing to grant a corporation a charter empowering it to conduct a certain enterprise, and then say that the [593] right to obtain the means necessary to the execution of the purposes of its organization was impliedly denied by the charter. In section 760 of 3 Cook on Corporations it is said: "The power of a corporation to borrow money is implied, and exists without being expressly granted by charter or statute. Common law places no limit upon the amount which the corporation may borrow. The amount borrowed may be greater than the capital stock. Although a gas company has no power to issue bonds in excess of its capital stock, yet this does not restrict its right to issue notes." In section 761, it is said: "The power of a corporation to sell and indorse notes received by it in connection with its own business is, of course, undoubted. It is a part of the every-day business of most corporations." In 7 Thompson on Corporations, section 8340, it is said: "In the United States, in the absence of statutory provisions, the power to emit negotiable paper is regarded as one of the incidental or implied powers of every private corporation. The power necessarily follows from the power to borrow money or to become indebted in any lawful way. This is nothing more than giving that form of security for a debt which is exacted by ordinary business usage. Nor is this power affected by constitutional provisions or statutes imposing restraints upon the issuing of stocks or bonds." The conclusion cannot be avoided that the gas company, to carry out the purposes of its organization, unless denied by its charter, has the right to contract debts, borrow money, and give customary evidence of debt.

It is urged that because the charter of the gas company provides that it may issue bonds for $500,000, and execute a mortgage on its property to secure them, and that their proceeds shall only be used in improving the plant, it hereby [594] limits its power to contract any other kind of indebtedness or liability. Those who prepared the charter and its amend-

ments and the legislature knew the meaning of the words and terms employed in defining the power and limitations on the power of the corporation. If it had intended to limit the amount of indebtedness it should contract to the $500,000 of bonds, it would have been quite easy to have so said. As the limitation is only as to a bonded indebtedness which may be secured by mortgage, the necessary implication is that no limitation was intended to be placed on its power to contract other indebtedness which like corporations may legitimately contract in the execution of the purposes of their organization. The charter of a corporation, read in connection with the general law applicable to it, is the measure of its power.

In Greenbay etc. R. Co. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. Rep. 221, 27 L. ed. 413, the court said: "The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the object for which the corporation is created, is not taken to be prohibited." This rule of construction is approved in Rhorer v. Middlesboro Town etc. Co., 103 Ky. 146, 19 Ky. Law Rep. 1788, 44 S. W. 448. In Merchants' Nat. Bank v. Citizens' Gaslight Co., 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083, the court had under consideration a question very similar to the one here for solution. It was an action on a promissory note. The statute construed reads as follows: "No gas company, unless specially authorized by the legislature, shall hereafter issue any bonds [595] at less than the par value, nor for an amount exceeding its capital actually paid in, and applied to the purpose of its incorporation. The proceeds of all bonds issued shall be applied to the payment of obligations incurred for the enlargement or extension of the works and the purchase of real estate for the use of the company or for the payment of liabilities existing at the time of the passage of this act. A company may, upon vote of a majority in interest of its stockholders, at a meeting duly called for the purpose, issue bonds in accordance with the provisions of this section, to bear interest at not exceeding six per cent per annum, and may secure the payment of principal and interest which shall accrue, by a mortgage of its franchise and other property": Mass. Stats. 1886, p. 345, c. 346, sec. 3. The court said: "The defendant corporation's first

request for instructions relates to the effect of the statutes of Massachusetts of 1886, page 345, chapter 346, upon the power of defendant corporation to issue promissory notes. The third section of that statute relates to the issue of bonds by gas companies, and gives the company the right to secure bonds issued in accordance with the provisions of the section by mortgage of the franchise and property of the company, but we find nothing in the charter which affects the right of such company to issue promissory notes when convenient or necessary in the prosecution of its business." The constitution of California prohibited corporations from increasing their stock and bonded indebtedness, except in a specified manner. A corporation contracted a debt, executed its note therefor, and a mortgage to secure it, without doing that which the statute required to be done before increasing its bonded indebtedness. In an action to enforce the payment of the debt, the court, in Underhill v. Santa Barbara L. etc. Co., 93 Cal. 300, 28 Pac. 1049, among other things, said: "Manifestly it is not [596] the intention of the constitution to prohibit the increase of all kinds of indebtedness, since the prohibition of a particular kind implies that there may be indebtedness of another kind." In Clark and Marshall on Corporations, section 179, it is said: "A limitation of the amount of a particular kind of indebtedness does not apply to other kinds of indebtedness." We conclude that the gas company had the authority to contract the debts due the appellants.

It is conceded that the gas company was authorized to consummate the deal which resulted in its rightful ownership of the $1,600,000 of the light company's bonds. As the gas company owns the bonds, its right to sell them necessarily exists. It owes debts, and is under a legal obligation to pay them. In the judgment of the corporation, it is best to sell the lighting company's bonds which it owns for that purpose. If it has the right to sell them, it certainly has the right to apply their proceeds to the payment of its debts. If it can apply the proceeds to that purpose, it can sell them to its creditors, and thus discharge its debts. The bonds, not having a market value, cannot be sold at their real value unless the gas company gives the guaranty to which we have alluded. As the gas company acquired the bonds in carrying out the legitimate purposes of its organization and desires to sell them in furtherance of the same purpose, it follows that, if the guaranty is necessary to make

the proceeds available, it has the right to make it. It surely creates a personal liability. If it had the power to contract debts, and thus create a personal liability, it certainly has the power to create another personal liability to meet the former one. An objection is made because the bonds did not mature until 1918. This objection can only go to the question of the advisability of creating an obligation to continue during that period, which question alone must be [597] determined by the gas company. The objection cannot go to the question of power, which we alone have under consideration. Notes executed by the gas company to the appellant for the debts which it owes them would be valid, whether they were made payable one day or several years after date. If it held notes of customers payable years after date, it could assign them to the appellants in payment of their debts. The assignment by operation of law would create a personal liability. In the instance cited, as would be in the proposed guaranty, a personal liability would be created in the execution of the purposes of the organization, and would be enforceable. The guaranty requires the gas company to redeem the bonds if not paid. That fact cannot affect the question of the power to create a personal liability. The purpose of the guaranty is to give a market value to the bonds and make them available. Suppose, instead of selling the bonds with the guaranty, the gas company should execute its promissory notes to the appellants for the debts, and pledge the bonds to secure them; certainly it would not be contended that a personal liability would not be created, because the bonds were pledged as collateral. The difference in the liability between that arrangement and the proposed one is simply in form. In one instance the gas company would be required to pay notes which had been executed for the debts. In the other it would be required to pay its debts by the redemption of the bonds if not paid. The proposed guaranty by the gas company is not for the benefit of the lighting company, but for its own benefit. Therefore the precise question is not here involved, as would be in a case where one corporation guarantees the bonds of another corporation for the latter's benefit. There are some instructive cases involving the power of corporations to make contracts, and also guarantee the payment [598] of another corporation's obligations, when to do so is beneficial to the former company, by enabling it to promote its legitimate ends.

In Railway Co. v. Howard, 7 Wall. 412, 19 L. ed. 117, the court said: "Abundant proof exists in this record that railway companies may issue their own bonds to raise money to carry into effect the purpose for which they were created, and it is difficult to see why they may not guarantee the payment of such bonds as they lawfully received from cities and counties, and put them upon the market, instead of their own, as the means of accomplishing the same end. Undoubtedly they may receive such bonds under the laws of the state, and, if they may receive them, they may transfer them to others; and, if they may transfer them to purchasers, they may, if they deem it expedient, guarantee their payment, as a means of augmenting their credit in the market, and saving the corporation from the necessity of issuing their own bonds to accomplish the same purpose. Considered, therefore, as an open question, the court is of the opinion that the objection is without merit. Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and, until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business." In Frankfort Bridge Co. v. City of Frankfort, 18 B. Mon. 41, the court, in effect, held that, if the charter and statutory law is silent upon the subject of the power to make a contract, it may be implied on the part of the corporation, when directly or indirectly necessary to enable it to fulfill the purposes of its existence. In section 775 of Cook on Corporations, fifth edition, it is said: "One of the most important and yet difficult branches of railroad corporation law is the 599 question whether one railroad corporation may guarantee the bonds or dividends of another railroad corporation. After a great deal of litigation, the rule has become established that such a guaranty is valid, provided it is based on valuable consideration, and the consideration is such as the guarantor has power to receive or invest in." The case of Tod v. Kentucky Union Land Co. (C. C.), 57 Fed 47 (opinion by Judge Lurton), and the same case on appeal, 62 Fed. 335, 10 C. C. A. 393 (opinion by Judge Taft), supports our conclusion that the gas company has the right to guarantee the payment of the bonds.

By a provision of the charter, the city of Louisville has an option to purchase the gas company's property at the

expiration of the charter. It is urged that, if the liability resulting from the guaranty of the bonds exist at the time its right to purchase accrues, it would be embarrassed thereby. It is difficult to see how it will affect the rights of the city as a purchaser, not stockholder, because the amount of outstanding liabilities would have to be deducted from the purchase price ascertained in the manner provided by the charter. However, the question before us is not whether the city of Louisville will be able to become a purchaser of the property of the gas company, but it is whether the gas company proposes to exceed the power which we find it to possess when we read its charter in connection with general laws applicable to it.

We concur in the conclusion reached by the learned circuit judge in his able opinion.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

THE IMPLIED POWER OF CORPORATIONS TO BORROW MONEY AND TO GIVE EVIDENCE OF INDEBTEDNESS AND SECURITY THEREFOR.

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I. Scope of Note.

In this note we shall not discuss the numerous cases involving the right of a corporation to make and execute mortgages or bonds, except when such cases arise in a strictly borrowing transaction, in contradistinction to those transactions arising over the direct purchase of property by the corporation, or the taking over of the assets of other corporations. Neither shall we consider those cases in which the controversy is with respect to the construction of the express power under which the mortgage or bonds is stated to have been executed. And we shall also exclude those cases respecting the power of a corporation to mortgage its property or franchises for the purpose of securing debts not arising from borrowed money. Likewise we shall exclude the right of corporations to guarantee the debts or obligations of other corporations, except where the obligation is in the nature of a loan to the corporation making the guaranty. With respect to the doctrine of ultra vires in relation to the contracts of private corporations, see the monographic note to In re Assignment Mutual etc. Ins. Co., 70 Am. St. Rep. 156.

II. General Nature of Corporate Powers.

A corporation possesses only such powers as are expressly given it by its charter or necessarily implied therefrom to enable it to carry out the objects and purposes of its creation: Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302, 49 N. E. 592, 39 L. R. A. 725; Bankers' Union etc. v. Crawford, 67 Kan. 449, 100 Am. St. Rep. 465, 73 Pac. 79; Leggett v. New Jersey Mfg. etc. Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723, 46 L. R. A. 255. The provisions of a general incorporation statute enter into and form a part of the charters of all corporations organized under it: People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798, 8 L. R. A. 497; Danville v. Danville Water Co., 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118. In this connection the court in Green Bay etc. R. Co. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. Rep. 221, 27 L. ed. 413, said: "The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

III. General Extent of Implied Powers of a Corporation.

A corporation, unless prohibited by its charter or by statute, has power to make all contracts requisite for the purposes for which it was created: Deringer's Admr. v. Deringer's Admr., 5 Houst. 416,

1 Am. St. Rep. 150. Hence, a business corporation has implied power to do that which is reasonably necessary to the business, or that which is usually incident to its prosecution, but this is the limit of its implied power. Though it may foster its legitimate business, whatever it is, by all the usual means, it cannot exercise abnormal or extraordinary powers to do so: Northside Ry. Co. v. Worthington, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055. The implied powers in corporations are presumed to exist only to the extent that they may be necessary to enable such bodies to carry out the express powers granted and to accomplish the purposes of their creation: State v. Newman, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 South. 408. Any power which is obviously appropriate and convenient to carry into effect the franchise granted to a corporation is deemed a necessary one: Ellerman v. Chicago Junction etc. Co., 49 N. J. Eq. 217, 23 Atl. 287; while an incidental power of a corporation may be said to be one that is directly and immediately appropriate to the exercise of the specific power granted, and not one that has a slight or remote relation to it: People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798, 8 L. R. A. 497; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160. A person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation: First Nat. Bank v. Kiefer Milling Co., 95 Ky. 97, 23 S. W. 675; Kraniger v. People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

IV. Rule of Construction Applicable to Corporate Charters.

Charters conferring exclusive privileges are construed strictly against the corporators: Port of Mobile v. Louisville R. Co., 84 Ala. 115, 5 Am. St. Rep. 342, 4 South. 106; Appeal of Scranton Electric etc. Co., 122 Pa. St. 154, 9 Am. St. Rep. 79, 15 Atl. 446, 1 L. R. A. 285. But it is also said that though the charters of most private corporations are for purposes of private gain, still as they are intended also to subserve great public interests, they should be so construed as not to defeat the purpose of their creation: West Branch etc. Co. v. Lumber etc. Co., 121 Pa. St. 143, 6 Am. St. Rep. 766, 15 Atl. 509.

V. Distinction Between Want of Power and Irregularity in Its Exercise.

With respect to the want of power in a corporation to issue negotiable instruments and irregularities in the exercise of such a power, a distinction to the effect that persons dealing with the corporation are presumed to know the extent of its corporate powers, while with respect to the defenses arising from irregularities in its exercise such a presumption does not exist, is recognized by the courts: Mitchell v. Rome R. Co., 17 Ga. 574; Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410; Merritt v. Lambert, Hoff. Ch. (N. Y.) 166; Attorney General v. Life etc. Ins. Co., 9 Paige, 470; Hays v. Bank of State, Mart. & Y. (Tenn.) 179; Root v. Godard, 3

McLean, 102, Fed. Cas., No. 12,037; Pearce v. Madison etc. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184.

VI. General Rule Respecting the Implied Power of Corporations to Borrow Money.

Although there are many cases which apparently question the implied power of a corporation to borrow money, still upon a close reading of such cases, they will be found to be controversies over the construction of express clauses in the corporation's charter relating to its power to borrow money or prescribing the manner of exercising the power, or relating to the sort or amount of security that may be issued as a basis for the loan. Besides, many of such cases are controversies respecting the right of a corporation to exchange its bonds or other evidences of indebtedness for property or stock of other corporations. Hence we do not find any real conflict of authority with respect to the implied right of corporations to borrow money and to give evidence of indebtedness and security therefor. Most of the conflict of authority which may be found relates to the effect of constitutional or statutory regulations respecting the issuance of bonds at less than their par value.

In Chicago etc. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117, the United States supreme court observed: "Private corporations may borrow money or become parties to negotiate paper in the transaction of their legitimate business unless expressly prohibited, and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business."

The common-law powers of private trading corporations are ordinarily the same as those possessed by individuals, and may be employed in the same manner. Hence they may, unless restricted by their charters or some positive or clearly implied prohibition of law, mortgage their property to secure the payment of money borrowed in the course of their business to enable them to carry on the purposes of their organization: Farmers' Bank v. Ohio Steamboat Co., 108 Ky. 447, 56 S. W. 719. And where general authority is given to a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories, and may borrow money to attain its legitimate objects, precisely as an individual, and may bind itself by any form of obligation not forbidden: Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

Hence the general rule is that private corporations, in the absence of any express prohibition, have an implied power to borrow money necessary to carry out the purposes of their organization: Alabama etc. Ins. Co. v. Central Agr. etc. Assn., 54 Ala. 73; Taylor v. Agricultural etc. Assn., 68 Ala. 229; Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248; St. Joseph's Polish etc. Soc. v. St. Hedwig's Church, 4 Penne. (Del.) 141, 53 Atl. 353; Ward v. Johnson, 95 Ill. 215; Wallis

v. Johnson School Tp., 75 Ind. 368; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; Thompson v. Lambert, 44 Iowa, 239; Commercial Bank etc. v. Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171; Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, ante, p. 302, 81 S. W. 927; Heironimus v. Sweeney, 83 Md. 146, 55 Am. St. Rep. 333, 34 Atl. 823, 33 L. R. A. 99; Hart v. Missouri State Mut. etc. Co., 21 Mo. 91; Hayward v. Graham Book etc. Co., 59 Mo. App. 453; Richards v. Merrimack etc. R. Co., 44 N. H. 127; Lucas v. Pitney, 27 N. J. L. 221; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; Swackhamer v. Town of Hackettstown, 37 N. J. L. 191; Mead v. Keeler, 24 Barb. 20; Curtis v. Leavitt, 15 N. Y. 9; Barnes v. Ontario Bank, 19 N. Y. 152; Hope Mut. etc. Ins. Co. v. Perkins, 38 N. Y. 404; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Coats v. Donnell, 94 N. Y. 168; Hays v. Galion Gas etc. Co., 29 Ohio St. 330; Union Bank v. Jacobs, 6 Humph. 515; Moss v. Harpeth Academy, 7 Heisk. 283; Burr's Exr. v. McDonald, 3 Gratt. 215; Rockwell v. Elkhorn Bank, 13 Wis. 653; Humphreyville Copper Co. v. Sterling, Fed. Cas., No. 6872; Memphis etc. R. Co. v. Dow, 19 Fed. 388; Grommes v. Sullivan, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419.

As was stated in the principal case, the customary power to contract debts or borrow money for the purpose of accomplishing the purposes of the organization of the corporation, and to give the customary evidences of debt and security therefor, is only limited by the provisions of its charter in the statute: Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, ante, p. 302, 81 S. W. 927.

But a corporation has an implied power to borrow money to carry its specific powers in effect, notwithstanding its charter provides that if the amount of assets authorized is insufficient, additional sums shall be raised by the issuance of new shares: Richards v. Merrimack etc. R. Co., 44 N. H. 127.

In discussing the reasons for the rule allowing corporations an implied power to borrow money in the absence of express prohibition, the court in Peoria Star Co. v. Cutright, 115 Ill. App. 492, said: "The power to borrow money, in furtherance of the corporate purpose, is a necessary incident to the power conferred by the charter of the company: 3 Cook on Corporations, 5th ed., sec. 760, and cases there cited; West v. Madison Co. Agr. Board, 82 Ill. 205. To hold that a corporation organized for any legitimate purpose did not have the power to borrow money and issue its notes, bonds or other evidences of indebtedness, to raise money to effectuate any lawful purpose connected with and germane to its corporate objects would be to deprive such corporation of the means of carrying out the purposes of its creation: Peoria & Springfield R. R. Co. v. Thompson, 103 Ill. 187. Even if this were not true, and the company in fact does borrow money without any express or implied power to do so, it must repay the money borrowed: Humphrey v. Patrons' Mercantile Assn., 50 Iowa, 607; Larwell v. Hanover Sav. Fund Soc., 40 Ohio St. 274; Bradley v. Ballard, 55

Ill. 413, 8 Am. Rep. 656; Darst v. Gale, 83 Ill. 136. The use of the money borrowed for an ultra vires purpose, though known to the lender, is no defense: Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907. There is a well-defined distinction to be noted between acts which are mala in se or mala prohibita and those which are merely ultra vires; as respects the former, the peace and good order of the state is involved, and the law pronounces every contract to perform such an act or in consideration of, or in furtherance of, such performance as absolutely void, while that which is merely ultra does not necessarily involve any moral turpitude or illegality. The words 'ultra vires' and 'illegality' represent ideas that are totally distinct and altogether different. While there may be a confusion of these terms in some of the earlier cases in England, yet the books are full of later cases, both in England and in this country, where the distinction is clearly pointed out. To illustrate, a street railway company may make a subscription to be paid out of its corporate funds, to build a church, establish an orphans' home, or a hospital for inebriates, by the sanction of its board of directors, and the contract would be clearly ultra vires, and so long as it remains executory, there is no doubt a court of chancery would interpose at the suit of a stockholder to enjoin the payment, but there is nothing illegal in the building of churches, or orphans' homes, or hospitals. An act may be both ultra vires and illegal, but it is not illegal simply because it is ultra vires: Bissell v. Michigan Southern R. R. Co., 22 N. Y. 258. When the courts are appealed to to interpose to restrain the performance of an ultra vires act, the rule is applied with great stringency to the corporation; but after an act has been executed which is not illegal, either by the corporation or by the other contracting party, the plea of ultra vires is rarely ever available as a defense to an action on the contract by the party who has performed: Bissell v. Michigan Southern etc. R. R. Co., 22 N. Y. 258, and cases there cited; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; National Home Bldg. Assn. v. Home Sav. Bank, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619, 64 L. R. A. 399.''

A distinction, however, is said to exist as between private corporations and municipal corporations respecting their implied power to borrow money. The rule respecting municipal corporations is, that in the absence of a specific grant of power, the implied capacity to borrow money does not exist. The reasons for the distinction were stated in Swackhamer v. Town of Hackettstown, 37 N. J. L. 191, the court saying: ''At the present time it seems to be generally conceded that a private corporation, constituted with a view to pecuniary profit, has, by implication, when not in this particular specially restricted, the power in question. The law was so held in this state, in the case of Lucas v. Pitney, 27 N. J. L. 221, and the same rule has been repeatedly recognized in the other decisions. And this result is the appropriate product of the principle that corporate powers, which are the necessary

accompaniments of powers conferred, will be implied. In these instances the ability to borrow money is so essential that without it the business authorized could not be conducted with reasonable efficiency, and, as it cannot be supposed that it was the legislative intent to leave the company in so imperfect a condition, the inference is properly drawn that the power to raise money in this mode is inherent in the very constitution of such corporate bodies. Such a deduction is simply, in effect, a conclusion that the lawmaker designed to authorize the use of the means fitted to accomplish the purpose in view. It has been often said that the means which can be thus raised up by implication must be necessary to the successful prosecution of the enterprise, and that the circumstance that they are convenient will not legalize their introduction. But the necessity here spoken of does not denote absolute indispensableness, but that the power in question is so essential that its nonexistence would render the privileges granted practically inoperative or incomplete. It is, consequently, obvious that a presumption resting on such a basis as this must spring up in favor of almost the entire mass of commercial and manufacturing corporations, for without the franchise to effect loans, the chartered business could be but imperfectly transacted. And yet, even in such instances, the usual inference that such an implied power exists may be repelled by the language of the particular charter or the peculiar circumstances of the case. In a word, the rule of law in question is nothing but the discovery, by the courts, of the legislative intent, such intent having been ascertained by a construction of charters, as applied to the subject matters.

"Taking this as the ground of our reasoning, I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. I do not wish to be understood as indicating that under certain special conditions an opposite deduction may not be legitimately drawn. It is plain that it is practicable to impose a duty on a municipality requiring the immediate use of large sums of money, and in such a situation the inference may become irresistible that it was intended that funds were to be provided by loans. My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary municipal opera-

tions cannot be efficiently carried on except with the assistance of borrowed capital.

"Without any help of this kind, it is well known that our towns and cities have long been, and are now being, improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes. Consequently, I am unable to perceive any necessity to borrow money, under these conditions, from which the gift of such power to borrow is to be implied." And continuing the court observed: "An examination of the books will show that this question has not as yet received much judicial consideration. The courts of Wisconsin and Ohio have had this matter before them, and have arrived at a result the opposite of that which has just been stated. I have carefully weighed the arguments of these learned tribunals; but they have failed to convince my understanding. The cases referred to are those of Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721, and Bank of Chillicothe v. Town of Chillicothe, 7 Ohio, pt. II, 31, 30 Am. Dec. 185. As a counterpoise to these views stands the weighty opinion of Judge Dillon, in his treatise on Municipal Corporations, volume 1, section 81 [117]. Much emphasis is added to this expression of opinion, from the fact that this author had before him, at the time he wrote, the opposing cases just cited. In this state of the authority, it cannot be claimed that the principle is so settled that the judgment of this court cannot be freely exercised with respect to this important subject. My conclusion is that already expressed, that a right to borrow money is not to be inferred from any of the ordinary powers conferred in the charters of municipal corporations, and that, under ordinary circumstances, such a power can proceed only from an express grant to that effect."

But inasmuch as the question of the implied right of public corporations to borrow money is foreign to the subject of this note, we will not advert further to cases involving such rights with respect to municipal or other public corporations. We have adverted to the distinction which is made respecting private and public corporations for the purpose of showing that cases involving such implied power of public corporations are no authority with respect to such right either in favor of or against corporations organized for pecuniary profit.

VII. Right of Various Classes of Corporations to Borrow Money.

Sometimes the implied right of a corporation to borrow money has been questioned because of the nature of the business in which the corporation is engaged, though in the majority of cases the real question in the case has been with reference to the manner in which a conceded power to borrow has been exercised, or with respect to a construction of charter provisions limiting the power to borrow money and issue evidences or security therefor. Thus the right of a fire insurance company to borrow money to pay its losses has been recognized: Orr

v. Mercer Co. Mut. Fire Ins. Co., 114 Pa. St. 387, 6 Atl. 696. But a corporation organized "to make insurance upon vessels, goods or merchandise, freight, bottomry, respondentia and all kinds of property, against loss, etc., to lend money on bottomry and respondentia, and to do and perform all matters and things for the well-being of the corporation, not contrary to the provisions of this act," has been held not authorized to borrow money to pay its debts: Bacon v. Mississippi Ins. Co., 31 Miss. 116. A corporation authorized to purchase land and hemp has an implied power to deal on credit and borrow money within the sphere of its prescribed business: Commercial Bank v. Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171. And a corporation organized to manufacture copper and brass goods may borrow money to buy raw material at low prices even in excess of its immediate needs: National Shoe etc. Bank's Appeal, 55 Conn. 469, 12 Atl. 646. And inasmuch as mining corporations must have money in order to accomplish the purposes of its creation, it has been naively remarked by the New York court that if such a corporation has not got the funds and cannot otherwise readily get them, it has an implied power to borrow them: Kent v. Quicksilver Min. Co., 78 N. Y. 159. Hence a mining corporation having authority to incur debts in carrying on its mining business may borrow money for that purpose: Union Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248. And a mining corporation has an implied power to borrow money to pay its current expenses: McConnell v. Combination Min. etc. Co., 31 Mont. 563, 79 Pac. 248. Under a charter provision authorizing a mining company "to enter into any obligations or contracts essential to the transaction of its ordinary affairs or for the purposes for which it was created," and empowering its directors to exercise its corporate powers, they may borrow money for such purposes: Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707.

The right of a gas-lighting company to borrow money and issue its promissory notes therefor was recognized in Merchants' Nat. Bank v. Citizens' Gas Light Co., 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083.

A railroad corporation may borrow money to construct its road: Savannah etc. R. Co. v. Lancaster, 62 Ala. 555. And it may borrow money to carry out the purposes of its creation, even though its charter provides that its funds are to be raised by share subscriptions: Union Bank v. Jacobs, 6 Humph. 515. But a corporation organized for railroad purposes has no authority to give its promissory notes for a steamboat, even though it is to be used in connection with the railroad: Pearce v. Madison etc. R. Co., 21 How (U. S.) 441, 16 L. ed. 184.

The right of banks to borrow money in the strict sense of the word "borrow" has frequently been questioned in argument, but the courts, though acknowledging that there was considerable force in the arguments against the right, have held that banks clothed with general

banking powers have an implied power to borrow money: Ward v. Johnson, 95 Ill. 215; Tuttle v. Nat. Bank, 48 Ill. App. 481; Donnell v. Lewis Co. Sav. Bank, 80 Mo. 165; Ringling v. Kohn, 6 Mo. App. 333; Curtis v. Leavitt, 15 N. Y. 9; Barnes v. Ontario Bank, 19 N. Y. 132; Coats v. Donnell, 94 N. Y. 168; Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. Rep. 572, 38 L. ed. 470; Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. Rep. 628, 43 L. ed. 920; Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 20 Sup. Ct. Rep. 498, 44 L. ed. 611. But under a Massachusetts statute it was held that a bank was not prohibited from borrowing of another bank payable on demand with interest, but from borrowing money from another bank where it was payable at a future day certain: Commonwealth v. Bank of Mut. Redemption, 4 Allen, 1.

The United States supreme court in Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. Rep. 572, 38 L. ed. 470, in its discussion of the implied right of banks to borrow money, after setting forth the terms of the national banking act, observed: "The power to borrow money or to give notes is not expressly given by the act. The business of this bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted. Still it was said by this court, in the case of First Nat. Bank v. National Exchange Bank, 92 U. S. 127, 23 L. ed. 679: 'Authority is given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs within the scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.'

"Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require these making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money."

Savings banks have also an implied power to borrow money required in the course of their business, and to make negotiable paper or pledge its securities as a basis for such a loan: Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318. The court, in the case just cited, observing that: "Savings banks are established for business purposes. Their functions are to receive, hold, and invest moneys that may be deposited with them, and to repay the money deposited under reasonable regulations in their by-laws. In order to make the business successful, these institutions are required to keep their money invested as closely as may be consistent with the ordinary demands of depositors. But in seasons of financial excitements they may be subjected to extraordinary demands from depositors, to meet which, and save the credit of the institutions, large sums of money may be

required to be raised on sudden and unforeseen contingencies. At such times the securities such institutions usually hold are likely to be depressed in the market and unsalable, except at ruinous sacrifices. If these institutions should not have the power to borrow money and to make negotiable paper, or make a pledge of securities on which money may be borrowed temporarily, great sacrifices in the sale of the securities in which the trust funds are invested, if not financial ruin, would be the probable result of every unexpected run upon the bank by depositors to withdraw their deposits. It is the existence of conditions and contingencies of this kind, likely to arise in the conduct of business, that the law recognizes as the ground for raising, by implication, a power in corporations to borrow money, and give negotiable security as a means of borrowing."

Although it is urged that the nature of the business of building and loan associations excludes the idea of their right to borrow money, and that the allowance of such a power would be destructive of the very purposes of their organization, still the weight of authority is to the effect that such associations have the incidental right to borrow money where such a right is reasonably necessary to carry on its business: Cook v. Equitable Bldg. etc. Assn., 104 Ga. 814, 30 S. E. 911; Marion Trust Co. v. Crescent Loan etc. Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688; Davis v. West Saratoga Bldg. Union, 32 Md. 285. Hence the assertion in the charter of such an association of the power to borrow money and issue different classes of stock does not deprive the association of its character as a building and loan association: Zenith Bldg. etc. Assn. v. Heimbach, 77 Minn. 97, 79 N. W. 609; Manship v. New South. Bldg. etc. Assn., 110 Fed. 845. And in Wisconsin it has been held that a building association organized under its laws is not prohibited from borrowing money on the maturity of a series of stock to pay the shares of the nonborrowing members of that series instead of accumulating funds to pay off such series: North Hudson Mut. Bldg. etc. Assn. v. First Nat. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

In Cook v. Equitable Bldg. etc. Assn., 104 Ga. 814, 30 S. E. 911, the court in arriving at the conclusion that building and loan associations have an implied power to borrow money, said: "As a general rule, a private corporation can incur a debt by procuring a loan of money for the purpose of carrying on its legitimate business. We see no reason why these associations are not clothed with a like power and privilege. From the nature of the plan of these associations, it necessarily follows that in the incipiency of their organization, on account of the small and gradual payments made upon their stock, they can have for some time but a small fund upon which to operate. To meet this, or any other emergency in its business, it may be to the interests of all its membership at times to borrow money. Should any abuse of such power arise on the part of the officers of the association, any member thereof would have his remedy in the courts to

correct it. There is some respectable authority against this view, but, as stated in 4 American and English Encyclopedia of Law, second edition, page 1022: 'The better opinion is that there is nothing to take such associations out of the rule governing corporations generally, and that they have the power to borrow in order to further the ends of their incorporation, even though no such power is conferred by the charter or general law, or recognized in the by-laws.' In Thompson on Building Associations, page 113, section 4, it is declared: "The unquestioned weight of authority in America is to give building associations the incidental right to borrow. The question of the right to borrow is to be determined by inquiring into its objects and purposes. It has conferred upon it those incidental rights that are consistent and reasonably necessary to carry on its business. The vital question is, Is borrowing necessary to accomplish its objects? If it is, then, upon principle and authority, it may borrow': See, also, Endlich on Building Associations, 2d ed., sec. 297 et seq."

But the right of such building and loan associations to borrow money was denied in Columbus Bldg. etc. Assn. v. Kriete, 87 Ill. App. 51, and State v. Oberlin Bldg. etc. Assn., 35 Ohio St. 258.

VIII. Rule Respecting the Implied Power of Corporations to Issue Evidences of Indebtedness or Security for Money Borrowed by Them.

Inasmuch as the same rule of finance is generally applied toward corporations when applying for a loan as is applied toward individuals under the same circumstances, namely, the necessity of executing an evidence of indebtedness and producing security for the proposed loan, it has been found necessary by the courts to announce it to be the rule of law that the power to issue notes, bonds, mortgages or other evidences of indebtedness or security therefor follows as an incident to an implied power of a corporation to borrow money: Taylor v. Agricultural etc. Assn., 68 Ala. 229; City of Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557; Hamilton v. Newcastle & D. R. Co., 9 Ind. 359; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; Thompson v. Lambert, 44 Iowa, 239; Commercial Bank etc. v. Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171; Farmers' Bank v. Ohio Steamboat Co. 108 Ky. 447, 56 S. W. 719; Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, ante, p. 302, 81 S. W. 927; Lucas v. Pitney, 27 N. J. L. 221; Richards v. Merrimack etc. R. Co. 44 N. H. 127; Mott v. Hicks, 1 Conn. 513, 13 Am. Dec. 550; Mead v. Keeler, 24 Barb. 20; Smith v. Law, 21 N. Y. 296; Carpenter v. Black Hawk etc. Co., 65 N. Y. 43; People v. American Steam Boiler Ins. Co., 3 App. Div. 504, 38 N. Y. Supp. 406; Commissioners of Craven v. Atlantic etc. R. Co., 77 N. C. 289; Straus v. Eagle Ins. Co., 5 Ohio St. 59; Andres v. Morgan, 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875; Powell v. Blair, 133 Pa. St. 550, 19 Atl. 559; Union Bank v. Jacobs, 6 Humph. 515; Grommes v. Sullivan, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419. Or, in other words, a corporation which has the power to

borrow money may execute such power in the same manner in which a natural person would: Hays v. Galion Gas etc. Co., 29 Ohio St. 330. And where a corporation has the power to borrow money, it is immaterial what kind of instrument it issues acknowledging the debt: Miller v. New York etc. R. Co., 18 How. Pr. 374. The general rule being that trading corporations may give promissory notes for any indebtedness contracted within the scope of their power, and the prima facie presumption is that notes given by such corporations are for such indebtedness: Gebhard v. Eastman, 7 Minn. (Gil. 40) 56. Likewise a corporation may accept bills of exchange for the purposes of its business: Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Partridge v. Badger, 25 Barb. 146.

A railroad corporation expressly authorized to borrow money with which to construct its road, but not expressly authorized to make a mortgage for the payment of such money, has an implied power to do so, but cannot mortgage its corporate existence or any prerogative franchise conferred upon it. The right to build and use the road is not, however, a prerogative franchise, and a purchaser under the mortgage would take the road subject to the terms of the charter designed to protect the public and would be fully bound thereby: Bardstown etc. R. Co. v. Metcalfe, 4 Met. (Ky.) 199, 81 Am. Dec. 541. Railroad bonds are regarded in the nature of mere bills and notes: Ide v. Passumpsic etc. R. Co., 32 Vt. 297. Consequently, a railroad company having power to borrow money may issue negotiable bonds: Miller v. New York etc. R. Co., 18 How. Pr. 374. Though corporations have power by common law to issue bonds, still, under the Massachusetts statute, it was held that railroad corporations have no power to issue bonds for the payment of money except for the purposes and in the mode prescribed by the statute: Commonwealth v. Smith, 10 Allen, 448, 87 Am. Dec. 672. But under authority to borrow money, a railroad corporation cannot issue interest-bearing bonds secured by mortgage if a portion of such bonds are perpetual, since the fundamental idea of borrowing money implies a repayment: Taylor v. Philadelphia etc. R. Co., 7 Fed. 386.

But corporations cannot sell or mortgage their franchise to exist as artificial bodies, though they may sell or mortgage their franchises which are denominated as secondary, such as include the privilege granted by a city to a water company to operate its plant and the right to take tolls from the public: State v. Topeka Water Co., 61 Kan. 547, 60 Pac. 337.

Where a private corporation, free from debt, is reduced to two stockholders, who buy out the other stockholders, they have an equitable ownership of the corporate property, and may mortgage it to secure their individual debt for the purchase money: First Nat. Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904, 24 South. 351. The power to "borrow money and issue its bonds therefor"

carries with it the power to make negotiable paper and to give such securities as may be deemed most advantageous, and not as a limitation to the mere right to issue bonds: Talladega Ins. Co. v. Peacock, 67 Ala. 253. Likewise, a statutory prohibition against any corporation issuing bills, notes or other evidences of debt upon loans or for circulation as money does not prevent the corporation from borrowing money and from issuing the usual evidences of debt: Magee v. Mokelumne Hill etc. Co., 5 Cal. 258.

IX. Limitation of Amount that may be Borrowed Under the Common Law.

Under the common law there is no limit to the amount that may be borrowed by a corporation: Barry v. Merchants' Exchange Co., 1 Sand. Ch. 280.

X. Effect Where a Loan is an Ultra Vires Act.

Acts of a corporation spoken of as ultra vires are not necessarily unlawful, or even such as the corporation cannot perform, but merely those which are not within the power conferred upon the corporation by its charter, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed, and the funds applied, solely for carrying out the objects for which the corporation was created. But a corporation cannot avail itself of the defense of ultra vires, when a contract has been performed in good faith by the other party and the corporation has had the full benefit of its performance, and the same rule holds as to a party who has had the benefit of a contract fully performed by the corporation: Kadish v. Garden City etc. Bldg. Assn., 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236.

"Where the corporation, in the exercise of apparent power to borrow, secures from another a loan of money, on the faith that the power exists, it would be a miscarriage of justice to permit the company to escape liability on the ground that in the act of borrowing it transcended the limits of the power granted by its charter. Especially would this be so where there is nothing on the face of the paper by which the debt is evidenced, showing the company to have overstepped the boundary line of corporate privilege in the act of borrowing, and when there is no notice of a want of power or capacity to borrow, and the money is loaned and the security taken on the faith of its existence": Hays v. Galion Gas etc. Co., 29 Ohio St. 330. In other words, corporations as much as individuals are bound to good faith and fair dealing, and they cannot by their acts, representations or silence involve others in onerous engagements, and then disown their acts and defeat the just expectation which their own conduct has superinduced: Chicago etc. R. Co. v. Howard, 7 Wall. 412, 19 L. ed. 121.

The court in Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799, observed: "It is true, a corporation is a

being created by the law, and has properly no authority but such as is conferred upon it, expressly or by implication, by the law of its creation; yet it may become legally bound to observe and perform contracts which it had no authority to enter into. The ends of justice may require, as in this case, that the corporation which has exceeded its powers should be estopped by its own acts from pleading in defense of its assumed obligations that they were ultra vires. To apply the principle of estoppel is not to enlarge the powers of the corporation; nor does it give warrant to a corporation to disregard or violate the restrictions which have been expressly imposed upon it, or which exist in the absence of power conferred. It was said by the court in Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656: 'This doctrine [estoppel] is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act ultra vires has been accomplished.' In Railway Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693, the court say: 'The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.' Whether the plea of ultra vires should be allowed as a defense to assumed obligations should not be determined without regard to the character and objects of the incorporation, the nature of the powers conferred or withheld, the particular character of the obligations assumed or contract entered into, the relations of the contracting parties, and the bona fides of him against whom the doctrine of ultra vires is asserted. "In this case the defense sought to be made to the note is that in giving it the article of the defendant's incorporation limiting the amount of its indebtedness was violated. The debt was incurred in the ordinary prosecution of the business of the corporation. The defendant received and appropriated the money which was the consideration of the note, and having authority to issue negotiable paper, it put forth the note in question, negotiable, calculated to circulate as, and perform the office of, commercial paper, and expressing upon its face the obligation and promise of the maker to pay to the bearer, at all events, the sum named. It has come into the hands of a bona fide purchaser, and simple justice, as well as plain principles of law, forbid that courts should listen to the plea that in this particular case the corporation had not authority to issue its note. It ought to be and is estopped. To so hold does not weaken the sanction of the law which restrains the exercise of corporate power within the limits prescribed by the creative act. To refuse to recognize and enforce, when necessary to the attainment of justice and prevention of wrong, such contracts, made in violation of the corporate charter, is not to afford a remedy for the wrongful acts of the corporation.

"When, in a case like this, the unauthorized contract has been executed by the corporation, and it has reaped the benefits of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law. In such a case, the remedy for the violation by the corporation of its charter power lies elsewhere. We are here seeking to administer justice as between these contracting parties. If justice did not invoke the application of other principles of law, the defense of ultra vires might be sufficient; but the doctrine of estoppel, as a principle of law, is as positive and well recognized as is the law that a corporation may not exceed its corporate powers, and, although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to him who has been misled by its acts performed within the general scope of its powers." The court, however, added: "What has been said should be regarded only as said with reference to this case, and should not be considered as stating a rule of law which should prevail generally in the case of contracts not negotiable."

In a later case in Minnesota, in which an officer of a corporation, whose charter limited the amount of indebtedness which it could at any time incur, embezzled the money obtained by the loan, Justice Mitchell, in rendering the opinion, called attention to the fact that the cases involving the recovery of amounts borrowed ultra vires fall principally in three classes. He observed: "None of the cases cited by plaintiff seem to us to be in point. They all fall within one of three classes: 1. Where the act was not in violation of the company's charter, but was merely claimed to be in excess of the powers delegated to some inferior agent; or 2. Where the corporation had received and retained the benefits of the transaction; or 3. Where the fact that the power of the corporation, in that regard, had been exhausted depended on the existence of certain extrinsic facts not known to the other contracting party. Dicta may be found in a few cases to the effect that limitations like this upon the amount of indebtedness which the corporation can contract are merely directory. But there can be no distinction in principle between a case where the charter or articles of association prohibit a thing altogether, and where it is prohibited beyond a certain limit. In the one case there is a total absence of authority to do the thing at all, and in the other a total absence of authority to do it beyond a certain limit; and after that limit is reached, there is as much an absence of authority in the latter case as there was in the former. No other rule would keep corporations in subordination to the state, or properly protect shareholders for whose special benefit these limitations, whether self-imposed or imposed by statute, are usually intended. And we think it will be found that, in every instance where any such dictum as that referred to has been uttered, the

facts bring the case within one of the three classes which we have named. Of course, we are not speaking of the rights of parties dealing with the corporation in good faith, without knowledge that the power has been exhausted, and who, as a rule, are not bound to investigate as to the extrinsic matters upon which that fact depends'': Kraniger v. People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

Hence, it may be said, in a general way, that even if a corporation borrowing money has no implied power to do so, it must repay money actually received by it: Union etc. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Darst v. Gale, 83 Ill. 136; Humphrey v. Patron's Mercantile Assn., 50 Iowa, 607; Hays v. Galion Gas etc. Co., 29 Ohio St. 330; Larwell v. Hanover Sav. Fund Soc., 40 Ohio St. 274; Manville v. Belden Min. Co., 5 McCrary, 391, 17 Fed. 425; Memphis etc. R. Co. v. Dow, 19 Fed. 388. And where either the statute or its charter limits the amount which the corporation may borrow, it is, as we have seen, held bound to repay the excess on the ground generally of estoppel: Garrett v. Burlington Plow Co., 70 Iowa, 697, 59 Am. Rep. 461, 29 N. W. 395; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799; Ossipee etc. Mfg. Co. v. Canney, 54 N. H. 295. But the recovery of this excess is not always allowed: Kraniger v. People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904; Moon etc. Co v. Waxahachie etc. Co., 13 Tex. Civ. App. 103, 35 S. W. 337. And it is also held that where the corporation had the power to borrow that it is no defense to a recovery that the money borrowed was used for an unauthorized purpose, and that the lender knew that fact: Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; Marion Trust Co. v. Crescent etc. Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

Money advanced to a corporation by a director in good faith and received and used by it for corporate purposes, the corporation being out of funds, is a valid claim against the corporation: Santa Cruz R. Co. v. Spreckels, 65 Cal. 193, 3 Pac. 661, 802. So, also, if a bank furnishes money to a corporation, whether as a loan upon unauthorized notes or upon account or for legitimate loss, or in discharge of its legal liability, such money, so far as it is in fact applied to the benefit of the corporation, may be recovered to the extent to which it has not been repaid: Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29. A mortgage by a corporation to secure a debt in excess of the limit allowed by its articles of incorporation is not for that reason invalid: Warfield v. Marshall etc. Co., 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467.

And where a corporation uses money loaned to it on the promissory note of its president, it is liable therefor on a common count for money loaned: Castle v. Belfast Foundry Co., 72 Me. 167; and

it was held in an early case in New York that where the note is void because forbidden by the charter or statute, that the holder may recover the money or value advanced for the note: Oneida Bank v. Ontario Bank, 21 N. Y. 490. And it has also been said that the borrowing of money by a corporation for the purpose of purchasing its own stock must be regarded as ultra vires, at least as against a lender who knew of such purpose: Adams etc. Co. v. Deyette, 8 S. Dak. 119, 59 Am. St. Rep. 751, 65 N. W. 471, 31 L. R. A. 497. And likewise where a corporation organized to purchase and subdivide land and sell it in the shape of lots executes a joint obligation with a street-car company for the cost of street-cars furnished the railway company it is not liable, since the charter purposes of the two companies are different, and neither can aid the interests of the other: Northside Ry. Co. v. Worthington, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055. And where the creditors of a corporation have been prejudiced by the corporation having borrowed money in excess of the amount limited by its charter, the assignee for the benefit of creditors may object to the collection of the amount in excess of the limit: First Nat. Bank v. D'Keefer Milling Co., 95 Ky. 97, 23 S. W. 675.

XI. Effect of Constitutional or Statutory Regulations Respecting the Issuance of Stock or Bonds Except for Value Actually Received.

a. In General.—In many of the states, there are constitutional provisions providing that no private corporation shall issue stock or bonds, except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void. The application of such constitutional provisions occurs more frequently with respect to exchanges of property or services of the promoters for stock in the corporation, than to sales of bonds for money. The supreme court of the United States, in referring to the intent of such provisions, has said: "The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock or bonds that do not represent anything whatever of substantial value." But it also observed: "It is not clear from the words used that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the

scheme whereby the appellant acquired the property, rights and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders'': Memphis etc. R. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. Rep. 482, 30 L. ed. 595.

But it has been held that the constitutional provision against the issuance of bonds except for money, etc., does not authorize a corporation to issue bonds to pay scrip dividends: Merz v. Interior Conduit etc. Co., 87 Hun, 430, 34 N. Y. Supp. 215. And where the promoters of a railroad corporation borrowed money from certain banks for purposes of the corporation and paid themselves by stock issued by the corporation in a sum greater than the amount due them from the banks, an issue of bonds to the banks in payment of their loan is not based on a consideration where the banks knew all the facts: Farmers' etc. Bank v. Waco etc. Light Co. (Tex. Civ. App.), 36 S. W. 131.

b. Right to Sell Bonds for Less Than Their Face Value.—The constitutional provision against the issuance of ''stock or bonds except for money, labor done, or money or property actually received,'' was construed with reference to an issue of bonds in Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375, the court, saying: ''The constitutional provision in question operates to invalidate evidences of indebtedness, when there is in fact no debt; to require every issue of stocks or bonds of private corporations to represent substantial values received by the corporations; to impose upon those charged with the disposition of corporate securities the duty to procure therefor a fair and reasonable equivalent in money, labor or property actually contributed to the corporation. Courts of the highest authority, which have considered the effect of such provisions, have not construed them, when not fortified by more stringent statutory requirements, as invalidating issues of stocks and bonds in exchange for money, property or labor, upon such terms as the corporate authorities in the fair exercise of their judgment and discretion may deem proper, though the amount received therefor was less than the face value of the securities. The negotiation of bonds must be a real transaction, carried through to promote legitimate corporate purposes, and not a mere trick or device to evade the law, and impose greater obligations upon the corporation than there is any occasion for it to assume in order to obtain the consideration received therefor. Issues of stocks and bonds have been sustained under constitutional or statutory provisions of the same import as the one under consideration, when they were disposed of for the best price that could be obtained, though for considerably less than their face value: Railroad Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. Rep. 482, 30 L. ed. 482; Peoria

etc. R. R. Co. v. Thompson, 103 Ill. 187; Stein v. Howard, 65 Cal. 616, 4 Pac. 662; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. Rep. 530, 35 L. ed. 237; Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. Rep. 468, 35 L. ed. 88; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. Rep. 476, 35 L. ed. 104."

The right of a corporation to issue its bonds for less than par was also recognized in Gamble v. Queens Co. Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527. And it was held in Texas under a constitutional provision against the issuance of bonds, "except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void," a sale of bonds at ninety-five per cent of their par value was sustainable where the transaction is made in good faith since that is a fair equivalent: Northside Ry. Co. v. Worthington, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

c. **Right to Pledge Bonds as Collateral Security to a Loan.**—The power of a corporation to pledge its bonds as collateral security follows from a power to sell them. Hence under a constitutional provision providing that no corporation shall issue stock or bonds except for money, labor or property, the corporation has the right to pledge its bonds as collateral security for money or property procured by it: Illinois Trust etc. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197. Consequently, one who loans money to a corporation and receives its bonds as collateral security, is a holder of such bonds for value in due course of trade, and as such entitled to protection: New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

Under a constitutional provision prohibiting the issuance of stock or bonds "save for labor done or money or property actually received or subscribed," and providing that "all fictitious increase of stock or indebtedness shall be void," a corporation may pledge its bonds as collateral for a loan of less than the par value of the bonds, the court observing with respect to the constitutional provision that: "The section assumes that a corporation may, for lawful purposes and in a lawful way, issue bonds. It is besides this settled that a corporation without special authority may dispose of land, goods and chattels, or of any interest in the same as it may deem expedient, and in the course of its legitimate business may make a bond, mortgage, note or draft: White Water Valley Canal Co. v. Vallette, 21 How. 424, 16 L. ed. 154; Railroad Co. v. Howard, 7 Wall. 413, 19 L. ed. 117. The constitution uses this word 'issued.' This term is broad enough to embrace the idea of pledge as well as that of sale. In contemplation of law, bonds pledged by a corporation are just as much issued as when they are sold: Atlantic Trust Co. v. Woodbridge C. & I. Co. (C. C.), 79 Fed. 842. As corporations issuing bonds may sell them bona fide below par, so in making a loan they may hypothecate

bonds greater in nominal value than the amounts borrowed. The mere fact that the bonds were issued for more than the value of the notes thus secured does not of itself indicate fraud or create a fictitious indebtedness'': William Firth Co. v. South Carolina Loan etc. Co., 122 Fed. 569.

But under a statute providing that no corporation shall issue any bonds except for money, labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent of the par value thereof, and providing that all bonds issued contrary to its provisions shall be void, the court held that bonds to the amount of two hundred and fifty thousand dollars, issued as collateral to a loan of one hundred and twenty-five thousand dollars, are void where it is not stipulated that the bonds shall be accounted for at not less than seventy-five cents on the dollar: Pfister v. Milwaukee Electric Ry. Co., 83 Wis. 86, 53 S. W. 27. The decision in National Foundry etc. Works v. Oconto Water Co., 52 Fed. 29, was to the same effect under very similar circumstances.

XII. Effect of Constitutional Provisions Against Fictitious Increase of Indebtedness, upon Bond Issues.

A constitutional provision prohibiting a fictitious increase of indebtedness does not apply to a sale of bonds at par by a railroad company, even though the securities given by the railroad company may turn out to be largely fictitious: Fidelity Ins. etc. Co. v. West Pennsylvania etc. R. Co., 138 Pa. St. 494, 21 Am. St. Rep. 911, 21 Atl. 21. And the giving of its bonds as security of a face value in excess of the debt secured, is not a fictitious issue or disposition of its bonds within the prohibition of a constitutional provision against such fictitious issues: Dexter v. McClellan, 116 Ala. 37, 22 South. 461. Much that was said in subdivision XI is applicable to this subdivision, since the two constitutional provisions generally are construed together.

XIII. Effect of Charter Limitations upon Amount of Indebtedness or Manner of Raising Money.

In the principal case a charter provision of a gas company providing that it may issue bonds for five hundred thousand dollars and execute a mortgage on its property to secure them, and that the proceeds shall only be used in improving the plant, was held not to limit the power of the corporation to contract any other kind of indebtedness or liability: Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, ante, p. 302, 81 S. W. 927. The implied power of corporation to borrow money is not restricted by a provision of its charter limiting the capital stock of the corporation to twenty thousand shares, and prescribing that no assessment shall be laid on any share of a greater amount than one hundred dollars on each share, and that if a greater amount of money is necessary, it shall be raised by creating new shares: Richards v. Merrimack etc. R. Co., 44 N. H. 127. And in Commonwealth v. Lehigh Ave. Ry. Co., 129 Pa. St. 405, 18 Atl. 414,

498, 5 L. R. A. 367, railway bonds for two hundred and fifty thousand dollars secured by a mortgage were held unauthorized because of a limitation in the charter to issuing bonds beyond one-half of the par value of the capital stock. The authorized capital was one million dollars, divided into shares of fifty dollars each. They were all subscribed, but only five dollars had been actually paid on the subscription toward each share. The court in an exhaustive opinion held that the par value of its shares was measured by the money which the corporation had actually received upon them, "and not by the broken promises of those who subscribed for them." But in Fidelity Ins. etc. Co. v. Western Pennsylvania etc. R. Co., 138 Pa. St. 494, 21 Am. St. Rep. 911, 21 Atl. 21, where the charter of the railroad company limited the right of the corporation to borrow money on the security of a mortgage of its franchise to twice the amount of its paid-up capital, the court held that the railroad company was estopped from denying the truth of its representations to the public that its paid-up capital was sufficiently large to authorize the loan, the court saying: "It cannot keep the money which it received as the price of the bonds and defend against their payment on the plea of ultra vires. If a stockholder or other party interested had asked it, the court would have enjoined against the execution of the mortgage or the negotiation of the bonds or the use of the money received for them; but no one asked it."

In this general connection, see, also, subdivision X.

XIV. Right to Lend Credit or Guarantee the Bonds of Other Corporations.

In the principal case it was held where a gas company acquired bonds in carrying out the legitimate purposes of its organization and desires to sell them in furtherance of the same purpose, it may, if a guaranty is necessary to create a market value for the bonds so as to make the proceeds available, make such a guaranty: Fidelity Trust Co. v. Louisville Gas Co., 118 Ky. 588, ante, p. 302, 81 S. W. 927. A railroad company may guarantee the payment of a debt which it may directly contract to pay: Low v. Central Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629. But a private corporation has no power to lend its credit to another or to pledge its property to secure the debt of another in a matter in which it has no interest or which is not for its benefit: Wheeler v. Home Sav. etc. Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598. The subject whether a corporation may guarantee the stock of bonds of another corporation merely as an accommodation to such other corporation or for the benefit of such other corporation is a question not within the scope of this note.

STANDARD OIL COMPANY v. DOYLE.

[118 Ky. 662, 82 S. W. 271.]

CONSPIRACY—Restraint of Trade.—Whether a conspiracy formed for the purpose of injuring or driving one out of business be lawful or unlawful, so far as its purpose is concerned, if unlawful means are used to effectuate such purpose, the conspiracy becomes actionable, and any loss or damage suffered in consequence may be recovered. (pp. 334, 335.)

CONSPIRACY in Restraint of Trade.—It is unlawful for those forming a conspiracy to injure another's business as an oil merchant, to obstruct, harass, and annoy his employés when engaged in the discharge of their duties in selling and distributing oil to his customers, or to threaten such customers to shut them up in their business if they continue to deal in such oil, or to cause and procure false and injurious reports concerning such merchant and his business to be circulated in the vicinity, or to procure such merchant's arrest and prosecution on false charges in connection with his business in the sale of oils for the purpose of estranging his acquaintances, customers and patrons. (p. 335.)

CONSPIRACY Consists of a combination between two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. (p. 340.)

CONSPIRACY—Declarations as Evidence.—A conspiracy being once established, or facts having been adduced which justify the inference of the existence of a conspiracy, the acts and declarations of each conspirator, made pursuant to, and in furtherance of such conspiracy after its formation and before its completion, are competent evidence against all of the conspirators. (p. 340.)

CONSPIRACY.—Acts or Declarations by one of the conspirators after the completion of the purpose for which the conspiracy was formed can be used as evidence against him alone. (p. 341.)

DEPOSITIONS—Compliance with Statute.—If the statute requires that an officer taking depositions shall deliver them to the clerk of court in which the action is pending or send them by mail or private conveyance and if sent by private conveyance, the person by whom sent must make oath that they were not opened by him or anyone else in their transit, and the officer taking the depositions makes affidavit as to the individual agent of the express company to whom he delivered them, and such agent, together with all others of the express company into whose hands the depositions passed to the time they were delivered to the clerk of the court, make affidavit that the depositions had not been opened by them, or any person in transit, and the clerk of the court makes affidavit that the depositions reached him in a sealed envelope directed to him as clerk, this is a sufficient compliance with the requirements of the statute. (p. 341.)

TRIAL—Instructions.—If the trial court has stated an undoubted proposition of law in a written instruction, an oral restatement of the proposition by the court, upon the request of the jury for information cannot be so prejudicial as to authorize a reversal. (p. 342.)

TRIAL—Remarks of Counsel.—In an action to recover damages resulting from a conspiracy to injure plaintiff's business as an oil merchant, to which a corporation is one of the parties defendant, remarks of plaintiff's counsel in argument to the jury. expressing his

opinion as to the great desire of such corporation to relieve itself of a competitor in the oil business in that vicinity, are competent and legitimate, and not open to objection. (p. 342.)

TRIAL—Verdict—Assessment of Damages for Conspiracy.—In an action to recover damages resulting from a conspiracy to injure plaintiff in his business as an oil merchant, to which a corporation and several individuals are made parties defendant, it is within the province of the jury to determine from the evidence which of the conspirators was most in fault and which would be benefited most by the formation and success of the conspiracy, and to assess damages in proportion accordingly. (p. 343.)

Breckinridge & Shelby and E. L. Hutchinson, for the appellants.

Morton, Webb & Wilson, for the appellee.

667 NUNN, J. This appeal is prosecuted from a judgment of the Fayette circuit court awarding appellee two thousand three hundred dollars in damages against the Standard Oil Company and three hundred dollars against C. B. Gilman, and involves some interesting questions. The appellants claim that a cause of action was not stated in the petition, and the court erred in overruling their demurrer thereto. It was, in substance, alleged in the petition that in the spring of the year 1901, in the city of Lexington, Kentucky, the appellants C. B. Gilman and M. F. Griffith, composing the firm known as the Brilliant Light Oil Company, and the Standard Oil Company, a corporation, did maliciously, unlawfully and wickedly conspire, combine, confederate and agree together between and among themselves to estrange and alienate the acquaintances, customers, and patrons of the appellee, to ruin, oppress, and impoverish the appellee, and drive him out of the business of selling and contracting for the sale of oils, gasolines, etc., and to deprive him of all benefit and profit under his said contract with the Wilburine Oil Works Company. After setting out the series of wrongful acts, which we will hereafter refer to, it continued as follows: That each and all of the wrongful acts were done in pursuance of the conspiracy alleged as existing between and among the several defendants, and that by reason of such conspiracy, and of the commission of the named wrongful acts in furtherance and execution thereof, appellee had been forced to give up and 668 quit the business of buying, selling and dealing in illuminating oil, gasolines, etc., in the city of Lexington and vicinity, and had been forced to cancel his contract with the Wilburine Oil Works Company,

and had been thereby deprived of all benefit and profit arising therefrom, and had been deprived of the opportunity to earn a livelihood for himself and family, and had been wrongfully prevented from engaging at his own home in the business and vocation of his life, which he had been pursuing for many years, and for which, from his long experience therewith and his extensive and favorable acquaintance in Lexington and vicinity, he was thoroughly fitted. It is contended that the acts of appellants, and each of them, as alleged, were legitimate for the purpose of building up their own business, and as against the appellee as a competitor, and if the appellee suffered any damages it was damnum absque injuria; and cite the following cases as sustaining their position: Bourlier v. Macauley, 91 Ky. 136, 34 Am. St. Rep. 171, 12 Ky. Law Rep. 737, 15 S. W. 60, 11 L. R. A. 550; Chambers v. Baldwin, 91 Ky. 121, 34 Am. St. Rep. 165, 12 Ky. Law Rep. 699, 15 S. W. 57, 11 L. R. A. 545; Brewster v. Miller, 101 Ky. 368, 19 Ky. Law Rep. 593, 41 S. W. 301, 38 L. R. A. 515; Baker v. Metropolitan Life Ins. Co., 23 Ky. Law Rep. 1174, 64 S. W. 913, 52 L. R. A. 271; West Va. Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591, 56 L. R. A. 804; Continental Ins. Co. v. Board of Underwriters (C. C.), 67 Fed. 310.

These cases are easily distinguished from the case at bar. The first two cases cited in effect decide that a third party cannot be made responsible in damages for causing a party to a contract to break it unless force or fraud is used in accomplishing the result. In such cases, without 669 an allegation and proof of force and fraud, the party breaking the contract must be regarded as having broken it of his own will, and for his own benefit, and is alone responsible to the other party to the contract in damages. The third case cited in substance decides that no cause of action arises in favor of a person who is refused the right to purchase articles from the dealer, the merchant or dealer having the lawful right to sell or refuse to sell to whom he pleases. In the case of Baker v. Metropolitan Life Ins. Co., 23 Ky. Law Rep. 1174, 64 S. W. 913, 52 L. R. A. 271, it was sought to recover damages from the company, and charged it with maliciously combining and confederating with other companies to prevent him (Baker) from receiving employment as an insurance agent at Lexington, for the term of two years, and in pursuance of such conspiracy

the Metropolitan Company discharged him from its employment without any fault on his part, and by reason thereof he had been deprived of earning his livelihood. The court decided the case against Baker for the reason that he alleged in his petition that his employment was for an indefinite length of time; he had therefore the right to quit whenever he saw proper, and the company had also the right to terminate the employment at pleasure; and the court also approved the principles announced in the case of Brewster v. Miller, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 515, to the effect that it is lawful in one to decline to enter into a business undertaking with anyone. The other two cases referred to do not support appellants' contention. In the petition a malicious conspiracy and confederation on the part of appellants to injure appellee in his business was charged; also the means employed by them to effectuate their purpose, and the injury and damage resulting to appellee by reason of the alleged wrongs. The charge of malicious conspiracy, confederation, etc., against appellants, even if true, did not give appellee a [670] cause of action, unless the means used by them to carry out their purpose were unlawful, and that by such means they succeeded in injuring appellee's business. Malice and bad motive alone do not constitute a cause of action, but where one exists they only make it worse for the defendants. Undoubtedly, one man may by fair methods compete with a rival until by sheer force of competition, by underselling or outbidding him, his own business is built up to the detriment and ruin of his rival. The damage in such case is in the eye of the law damnum absque injuria. But a different case is presented where one seeks not only to build up his own business at the expense of a rival's, but to impair, and if possible, destroy, that rival's business by the use of unlawful means by saying and doing that which he has no lawful right to say and do, in so far as it works loss and damage to his rival. It is also true whether a conspiracy formed for the purpose of injuring or driving one out of business be lawful or unlawful, so far as the purpose is concerned, yet, where unlawful means are used in effectuating that purpose, the conspiracy becomes actionable, and any loss or damage suffered in consequence may be recovered.

The petition in apt words alleged the conspiracy, the means used to effectuate the purpose and the resulting loss to appellee. The remaining matter to be determined is

whether the alleged means used to injure or drive appellee out of business were lawful or unlawful. If lawful, the petition did not state facts sufficient to constitute a cause of action; if unlawful it did and the lower court did not err in overruling appellants' demurrer. That part of the petition which describes the means used to effectuate their purpose is as follows: "By wanton and malicious interference with plaintiff's business and the conduct thereof in obstructing, harassing, and annoying plaintiff's servants and employés [671] while engaged in the discharge of their respective duties in selling and distributing oils, etc., to plaintiff's customers and patrons, and by willfully enticing, persuading and otherwise influencing such servants and employés to leave plaintiff's employ, against the will and consent of plaintiff; by threatening certain wholesale customers of plaintiff to shut them up in their business if they continued to purchase and deal in plaintiff's oils, etc.; and by threatening both wholesale and retail customers of plaintiff, that it (the Standard Oil Company, aforesaid) would refuse to sell them oil, gasolines and other commodities dealt in by said defendant as long as they continued to purchase such articles, or any of them, from plaintiff; by causing and procuring false and injurious reports concerning plaintiff and his business to be circulated in and about the city of Lexington, and published in certain of the daily newspapers of the city; by causing and procuring plaintiff to be arrested on various charges of violating the ordinances of said city, and the criminal and penal laws of the city of Lexington and commonwealth of Kentucky, and to be prosecuted therefor; and by divers and sundry wrongful acts to estrange and alienate the acquaintances, customers, and patrons of the plaintiff, to ruin, oppress, and impoverish the plaintiff, and drive him out of the business of contracting for the sale of oils, gasoline," etc. It was most assuredly unlawful to obstruct, harass, and annoy appellee's employés when engaged in the discharge of their duties in selling and distributing oils to appellee's customers; to threaten customers of appellee to shut them up in their business if they continued to deal in appellee's oils; to cause and procure false and injurious reports concerning appellee and his business to be circulated in Lexington and vicinity; and to procure appellee's arrest and prosecution on false charges [672] in connection with his business in the sale of oils for the purpose of estranging and alien-

ating the acquaintances, customers, and patrons of appellee: See the cases of Murray v. McGarigle, 69 Wis. 483, 34 N. W. 522; Buffalo Lubricating Oil Co. v. Standard Oil Co., 42 Hun, 153; Van Horn v. Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Payne v. Western etc. R. Co., 13 Lea, 507, 49 Am. Rep. 666; West Va. Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591, 56 L. R. A. 804.

The appellants claim that the court erred in refusing to give a peremptory instruction on their behalf at the close of appellee's evidence and at the close of all the evidence. The testimony is voluminous, and mostly circumstantial. That introduced by appellee tended to show the following state of facts: That appellee, prior to April, 1901, had been in the employ of the appellant the Standard Oil Company for fifteen or twenty years in the sale of oil, etc., in the city of Lexington and vicinity. At the date named Doyle resigned as its agent, and made an arrangement with the Wilburine Oil Works Company of Cincinnati to furnish him oils for sale in that city and vicinity. He was furnished this oil in carload lots, and did a thriving business in the months of May, June, and a part of July. He sold or contracted one carload of the oils to M. F. Griffith, a party defendant to this action, who was in the business of selling and distributing oils under the name of the Brilliant Light Oil Company. Doyle sold other oils to wholesale and retail dealers. Some time in the month of June, one Bonnycastle, representing the Standard Oil Company, arrived in the city of Lexington to look after the business interests of the Standard Oil Company in Kentucky by increasing its sales of oil, by making for it new customers, and, if possible, to [673] regain the customers lost by reason of Doyle's connection with the Standard Oil Company having been severed. According to his statement, he first approached appellant C. B. Gilman, who was the oil inspector for Fayette county, for aid and advice. They concluded that the best thing to do was to furnish wagons and oil to one Fisher, who was a deputy oil inspector under Gilman, to sell and distribute oil in opposition to Griffith who was running the Brilliant Light Oil Company. Immediately after this Bonnycastle and one Guthrie, another agent of the Standard Oil Company, went to the house of Griffith, and asked him why he had quit buying oil of the Standard Oil Company, and Griffith

told them that the company had not treated him right by not giving him a sufficient rebate. They then proposed that, if he would ship back the oil he had purchased from Doyle, they would then consider giving him a rebate of one cent per gallon, and also that, if he did not ship the oil back, that they would put wagons on the route in opposition to him, and ruin his trade. As a result of this and subsequent conversations, Griffith returned the oil he had purchased from Doyle, and formed a partnership with appellant Gilman, and they continued in partnership under the name of the Brilliant Light Oil Company for six months, when Gilman bought Griffith's half interest in the business. During this partnership and afterward, Fisher, who was the deputy oil inspector, was secretary and treasurer of the concern. They received two wagons from the Standard Oil Company to be used in peddling the company's oils.

Appellee's evidence tends to show that they were furnished without charge, while appellants showed that they were purchased. These wagons were run by drivers of the Brilliant [674] Light Oil Company in opposition to the appellee's wagons, and the proof of appellee shows that they obstructed, annoyed, and harassed the driver of appellee by following him, and sometimes getting in front of him, and stopping at every place where appellee's driver stopped; sometimes going into the residence with appellee's driver, and there offering to sell oil at a cheaper rate, and offering to give their oil without charge if they would not buy oil of appellee; in one or two instances cursing and abusing the driver of appellee. Sometimes they would stand for hours at one place awaiting the movement of appellee's driver. It was in proof that this conduct of the drivers of the Brilliant Light Oil Company was authorized and directed by the appellant Gilman. Gilman stated that he did not authorize the abuse, nor any of the improper conduct, but stated that the Brilliant Light Oil Company had their cans deposited at different residences throughout the city, and they did direct the drivers to follow up the drivers of appellee, and see to it that the oils sold by the appellee be not deposited in their cans, and, if the people at the places where their cans were deposited did not desire to continue to trade with the Brilliant Light Oil Company, then to take up their cans; that the following up of appellee's driver was continued only for a day and a half. Appellee's proof shows

that in some instances Gilman's drivers persisted in this conduct at places where the Brilliant Light Oil Company had no cans on deposit. Appellee proved that after he discovered that the Standard Oil Company had made an arrangement or contract with appellant Gilman, the oil inspector of Fayette county, to receive and dispose of its oils in competition with him, he then became fearful that his oils would not receive a fair inspection at the hands of his rival in business, and he had the next carload of oil run [675] across from Cincinnati to Ludlow, in Kenton county, and there inspected by the oil inspector of Kenton county, and then shipped on to him at Lexington. When this car reached Lexington, appellant and his deputy, Fisher, inspected it (Fisher first and afterward appellant), and they reported that it was below the test of 130 degrees Fahrenheit. The Kenton county inspector reported that it was above the legal test. When appellees learned of the action of the appellant and his assistant, he, with a friend, took samples of this oil from four or five barrels to the A. & M. College and there had Professors Scovel and Peters, expert chemists, make the test, and they found it above the legal test, and on the next day Gilman and R. J. O'Mahoney, an ex-oil inspector for that county, took samples of this oil, and made tests themselves, and had the same chemists—Scovel and Peters—make tests of it, and they found that the oil would burn at 129 degrees Fahrenheit. Gilman then branded this carload of oil and condemned it as unsafe for illuminating purposes. Then Gilman caused his deputy, Fisher, who was also a deputy clerk, to issue a summons against appellee to appear before the court to show cause why he should not be punished for selling unsafe oils. At the time of the issual of this summons appellee was in the state of Illinois, visiting his father. On his return the summons was served, and on motion of defendant it was dismissed for the reason that it was illegally issued. Then appellant Gilman appeared before a magistrate and made affidavit, and caused a warrant to be issued against appellee, charging him with selling and offering to sell unsafe and condemned oils. On the trial of this case before County Judge Bullock the court selected two persons to select four or five samples of this condemned oil, and had them brought into court, and there had tests made in his presence by Gilman, O'Mahoney, B. [676] Tansey, the inspectors for Kenton county, and Professors Scovel and Peters.

After hearing all the evidence and witnessing these tests, he dismissed the charge against appellee. After Gilman condemned this carload of oil, he reported verbally and in writing to the customers of appellee that the oils had been condemned, and that they must not buy it or sell it; that, if they did, they would be prosecuted for it. After this notice these customers of appellee did not sell any more of this oil, nor purchase any more oil from him. It was shown that the next carload of oil that was shipped to appellee was tested by Gilman and his assistant, and showed that it was above the legal test, as was reported by the inspector. Appellee introduced as a witness one Haffey, who was formerly in the employ of the Brilliant Light Oil Company, who stated that before this carload of oil was condemned by Gilman and his assistant he was present, and in a conversation which took place in the office of the Brilliant Light Oil Company, when Gilman said to the witness and Bonnycastle, the agent of the Standard Oil Company, that appellee had not treated him right in having this oil inspected in Kenton county, and trying to cut him out of his fees for inspection, and then remarked, "I don't think it will stand the test anyhow, and I will condemn it." Bonnycastle then said, "Condemn it, and we will see you through it." Appellee also introduced one W. C. Chipps, who stated that he was in the employ of the Standard Oil Company in Louisville at the time this competition arose between appellee and appellants, but soon thereafter ceased his connection with the company, and went to the city of Chicago, and engaged in the oil business with another company; that he returned to Louisville in August or September of the same year, and visited the office of appellant; that while he was there he remarked to Captain Harrison, who was the manager [677] for the appellant for the state of Kentucky, "I understand that John Bonnycastle is now agent for the company at Lexington." He made an affirmative reply, and I then asked him how Mr. Doyle was getting along in the oil business there, and he replied, "It has been reduced to a minimum, as we made arrangements with some peddlers that were already there, and furnished them wagons and oil, and put them out, and that soon settled the matter." The proof also showed that during this contest for supremacy in the oil business at Lexington, Bonnycastle and Gilman were often together in private conversation, each visiting the other's office frequently. It was also in proof that Bonnycastle,

about the time this oil was condemned, stated to one J. R. Dodd, a grocery merchant, who bought oil from appellee, that in the event he continued to buy oil from the appellee, he (Bonnycastle) would stop his wagon from delivering oil to him. He also told one Martin, another grocery merchant, that he could not buy oil from both parties. If he bought Doyle's oil, he could not get any more from the Standard Oil Company. This evidence—the statements of Bonnycastle to the customers of appellee—was not introduced for the purpose of showing illegal acts on the part of appellant company, for, as stated, it had the right to sell or refuse to sell its products to whom it pleased; but it was introduced to show the connection between it and those composing the firm of the Brilliant Light Oil Company, as a circumstance tending to show the conspiracy charged in the petition. It appears from all the testimony of appellee that he was injured and damaged in his business by unlawful means used by appellants.

While the evidence was conflicting upon all the questions at issue, and especially upon the issue of conspiracy, yet we are of the opinion that there was sufficient evidence upon [678] that point to authorize a submission to the jury. A conspiracy is a combination between two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. It is shown by the evidence that a purpose was accomplished by unlawful means, and when we consider the relation of the parties, their manifest motives of self-interest, the manner in which the purpose was carried out, and the declarations of the parties, it is reasonable to infer that this purpose was accomplished by concert of action and agreement of appellants.

Appellants complain that the court permitted statements made by appellant Gilman to be considered against himself and the appellant Standard Oil Company jointly, and statements made by the agents of the company, to be considered as against Gilman. This was done upon the idea that there were sufficient circumstances and evidence shown and introduced to authorize the jury to find that a conspiracy actually existed between appellants. The conspiracy being once established, or facts having been adduced which justify the inference of a conspiracy, the acts and declarations of each conspirator made pursuant to and in furtherance of the conspiracy are competent evidence against all. It matters

not in either case, when one enters into or becomes a party to the conspiracy, how prominent or inconspicuous a part he may take in the execution of the unlawful purpose or the use of the unlawful means; he is responsible to the fullest extent for all that precedes as well as all that follows in connection with the plot, whether done by himself or by one or more of his associates. The only limitation upon the rule is that what is said and done must be said and done after the formation of the conspiracy, and in furtherance and in pursuance thereof. Of course, what may be said or done by any one of the conspirators after the completion of the purpose [679] for which the conspiracy was formed, can be used only against the one saying or doing it.

The main contentions of appellants are that the petition did not state a cause of action, and that the proof did not authorize the submission of the case to the jury. The lower court did not agree with them, and gave to the jury seven instructions, which were admirably drawn, and met every phase of the issues involved, and, if erroneous in any particular, it was because one or two of them may have been more favorable to appellants than they were entitled to. The court in these instructions did not authorize the jury to find any damages for appellee for any loss sustained, if any, by the breaking of his arrangement or contract with the Wilburine Oil Works Company, and therefore appellants have not cause for complaint upon this point.

The appellants also complain that the lower court erred in not suppressing the depositions of Carrie Shrader and W. C. Chipps, because they were transmitted from the examiner at Louisville, the place where they were taken, to the clerk of the Fayette circuit court at Lexington, where the action was pending, by the Adams Express Company. Section 583 of the Civil Code requires that the officer taking the depositions shall deliver them to the clerk of the court in which the action is pending, or send them by mail or private conveyance. If sent by private conveyance, the person by whom sent must make oath that they were not opened by him or anyone else in their transit. In this case the officer taking the depositions made affidavit as to the individual agent of the express company to whom she delivered the depositions, and this agent, with all others of the express company into whose hands the depositions passed to the time they were delivered to the clerk of the Fayette circuit

court, made affidavit that the depositions had not been opened [680] by them or any person in transit. The clerk made affidavit that the depositions reached him in a sealed envelope directed to him, as clerk, with an indorsement showing the style of the action, and contained depositions. This, in our opinion met the requirements of the code, and is not in conflict with the opinion in the case of Breeding v. Stamper, 18 B. Mon. 175. This opinion construed section 646 of the Civil Code of 1854, which is unlike the present code. The Code of 1854 did not authorize depositions to be transmitted by private conveyance.

It is shown by the bill of exceptions that after the case was submitted to the jury they returned to the courtroom, and asked for information, to wit: "If the jury believe that three were in a conspiracy, can they find against two of them, and leave the other one out?" The court, in response to that question, said to the jury: "If the evidence in the case, under the law as given by the court, shows that three defendants were in a conspiracy, and that the plaintiff, under the law and facts in this case, is entitled to a verdict against all three, the jury should so find. The jury may, however, if they think that under the law and facts in this case such verdict is warranted, find a verdict against the different defendants in different amounts," etc. Appellants say that this last part is not responsive to the question asked by the jury, and was prejudicial to them. We do not so understand it. The court stated an undoubted proposition of law, as had already been stated in the fifth instruction, and this oral restatement of the proposition by the court could not have been prejudicial to the defendants' rights; at least not to such an extent as would authorize a reversal of the case.

The objection to and criticism of the argument of appellee's counsel in his closing remarks to the jury are not well taken. The effects of the remarks objected to amounted [681] only to his opinion of the great desire of the Standard Oil Company to relieve itself of a competitor in the oil business in the city of Lexington.

Appellants also complain of the amount of inequality of the verdict, and claim that it is an evidence of passion and prejudice on the part of the jury. It was within the province of the jury to determine from the evidence who was most in fault, and who would be benefited most by the formation and success of the conspiracy, and it is reasonable to pre-

sume that this accounts for the inequality of the amounts adjudged against appellants. If it be true, as the jury seems to have determined, that this conspiracy was formed, and in pursuance thereof the appellants fraudulently caused appellee's oils to be condemned, and willfully reported the oils to be below the legal test, when they knew or had reason to believe they were not below the test, and had appellee arrested upon the false charge of selling condemned oil, and obstructed, harassed, and annoyed appellee's drivers when delivering his oil, for the purpose of injuring and driving appellee out of the business of selling oils, we cannot say that the verdict is excessive.

Perceiving no error prejudicial to the substantial rights of appellants, the judgment of the lower court is affirmed.

Petition for rehearing by appellant overruled.

Unlawful Trusts and Combinations are considered in the monographic note to Harding v. American Glucose Co., 74 Am. St. Rep. 235-273. Combinations in business, not in the free competition of trade nor for the sole benefit of the business, but to induce the withdrawal of custom from another, solely for the purpose of wantonly injuring him, are actionable as unlawful conspiracies: West Virginia Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895.

Boycotting is the Subject of an extended note to Gray v. Building Trades' Council, 103 Am. St. Rep. 488-503.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

ROBERTS v. ROBERTS.

[102 Md. 131, 62 Atl. 161.]

A REMAINDER IS VESTED in Children where property is devised to their mother for life in trust for the use and benefit of herself and children. (p. 346.)

REMAINDER, When not Made Contingent by Power of Sale. When property is devised to a mother for life in trust for the use and benefit of herself and children, the fact that she is given the power to sell the real estate and invest the proceeds, and also power to lease, does not show an intention of the testator to create a contingent instead of a vested remainder. Nor can it be said that the power to use so much of the principal as may be necessary for the support of herself and children or for their education and advancement in life made the remainder contingent. (pp. 346, 347.)

POWER OF DISPOSITION, When Does not Create a Fee or Prevent the Vesting of a Remainder.—There may be a devise to one for life, with power of disposition, which will not affect the remainder over unless the power is exercised as authorized, and as to any part of the estate upon which the power is not exercised, the remainder is unaffected. Nor is a devise converted into a contingent remainder because the testator in his will speaks of property remaining after the death of the life tenant. The uncertainty whether the power will be exercised does not make the remainder contingent. (pp. 347, 348.)

REMAINDER, When not Contingent.—A devise to a person for the payment of debts and legacies is not contingent until they are paid, but confers an immediately vested estate. (p. 348.)

ESTATES, Vesting of is Favored.—The law favors the early vesting of estates, and in doubtful cases the interest should be deemed vested in the first instance rather than contingent, unless the instrument under consideration does not admit of such construction. (pp. 349, 350.)

A CONVEYANCE OR DEED of Trust of All the Real and Personal Estate of the Grantors, wheresoever situate, sufficiently describes the property conveyed and includes their vested remainder in real property. (p. 351.)

CONVEYANCE IN TRUST by Grantors, When Includes Their Individual as Well as Their Joint Property.—A Deed of Trust Exe-

cuted by a Husband and Wife reciting that they are indebted to sundry persons, and, being unable to pay in full, they propose to assign all their property in trust for their creditors, and purporting to assign all their property in trust to the grantees, with authority to convert it into money and apply the proceeds to the payment of their creditors, passes the individual as well as the joint estate of both grantors, and, as to the wife, is not restricted to her rights of dower, but includes a vested remainder in real estate which is her separate property. (pp. 354, 355.)

A VESTED REMAINDER can be Mortgaged and Conveyed, and is liable to execution. (p. 355.)

Frank Gosnell, George Weems Williams, John Milton Reifsnider and Charles E. Fink, for the appellants.

Charles E. Fink, John Milton Reifsnider, F. Neal Parke, Roberts & Crouse and J. A. C. Bond, for the appellees.

144 BOYD, J. There are two appeals in this record—one of which was taken by Margaret L. Roberts from that portion of a decretal order of the court below, which determined that her interest in her father's estate passed to Messrs. Roberts and Reindollar, trustees, under a deed of trust made by her and her husband, and the other by Margaret A. Landon and Clymer White, administrator, which involves the construction of the will of Augustus Shriver. The property of the testator having been converted into cash, the questions arising were presented by exceptions to audits. We will first consider the appeal last mentioned.

145 1. Augustus Shriver was married twice, and died on the 28th of July, 1872, leaving surviving him a widow, two children by his first wife and eleven by his second. After bequeathing one hundred dollars to each of the two children by his first wife and providing for payment of his debts and funeral expenses, he devised and bequeathed all the rest and residue of his estate to his wife "for and during the term of her natural life, in trust for the use and benefit of herself and our children"—expressing his confidence that she would manage it as would be most advantageous to herself and children. He then authorized his wife to sell any part of the real estate which she thought proper—"the proceeds of such sale or sales to be invested upon the trusts of this will"—and also to lease the real estate. He further gave her authority to use so much of the principal as may be required, "if it shall be necessary for the support of herself and our children, or for their education or advancement in life (all of which I confide to her discretion)," but recommended that she should not sell the farm

on which he resided unless absolutely necessary. Then follows this clause, "I devise and bequeath all my estate, real and personal, remaining at the death of my said wife, to my children by my said wife, share and share alike, absolutely in fee simple, the child or children of a deceased child shall stand in its or their parents place and stead, and receive and have the share and interest its and their parent would have been entitled to if living." He appointed his wife guardian of their children until they were twenty-one years of age, and sole executrix of his will.

Mrs. Shriver, the widow, died May 1, 1902, having disposed of a part of the corpus of the estate, in pursuance of the power conferred upon her. Two of the eleven children died after their father and before their mother—Alice E., who married George R. Gehr and left four children, and Carrie, who married Edwin Reese, leaving her husband and twin boys surviving her. Those twins died a few days after their mother. Edwin Rees, the husband of Carrie, married Margaret A. Adams after the death of his two children, and died November [146] 22, 1887, leaving all his property of every character and description to his wife, Margaret. She afterward married Thomas D. Landon. Letters of administration were granted to Clymer Whyte on the estates of the two Reese children. The statement of these facts will suggest the claim of Mrs. Landon, that is to say, that the two Reese children took their mother's interest in the estate of Augustus Shriver, and having died intestate their interest went to Edwin Reese, their father, as heir at law and next of kin, who by his last will and testament left them to his widow, who is now Mrs. Landon, one of the appellants—the children of the testator, according to Mrs. Landon's contention, having taken vested remainders in his estate.

It will be observed that the testator left his entire estate (after payment of debts, funeral expenses and legacies) to his wife "for and during the term of her natural life in trust for the use and benefit of herself and our children." The legal title was therefore vested in her and she and their children were the cestuis que trustent. The widow and eleven children held the equitable estate and were the beneficial owners during the widow's life. If the testator had simply left his estate to his widow and their eleven children, during the life of the former, and at her death to the eleven children, there could be no doubt that the children would have taken vested, not contin-

gent, remainders in the estate. It is thoroughly settled in this state that "it makes no difference, as to the vesting, whether the legal estate be devised to trustees who are required to convey according to the directions of the will, or whether the interest is provided to take effect without the intervention of trustees, nor that the trust provides for the accumulation of income until the period of payment or distribution arrives": Tayloe v. Mosher, 29 Md. 451; Ellicott v. Ellicott, 90 Md. 329, 45 Atl. 183, 48 L. R. A. 58.

The power given Mrs. Shriver to sell the real estate and invest the proceeds upon the trusts of the will was certainly not sufficient to show an intention to create a contingent instead of a vested remainder, nor was the power to lease it. Nor can it be said that the power to use so much of the principal [147] as was necessary for the support of herself and children or for their education or advancement in life necessarily made these contingent remainders. Although that power was expressly confided to her discretion, he did not give the estate to her to do what she chose with it, for her own benefit, but she could only use it for the purpose named, that is to say, for the support of herself and the remaindermen, or for the education or advancement in life of the latter. In Benesch v. Clark, 49 Md. 497, it was said that where an estate is given to a person generally or indefinitely with the power of disposition, such gift carries the entire estate, and the devisee or legatee takes the property absolutely, but when the property is given to one expressly for life, and there be annexed to such gift a power of disposition of the remainder, the rule is different and the first taker takes only an estate for life, with the power annexed. That has been approved in Foos v. Scarf, 55 Md. 310, Russell v. Werntz, 88 Md. 210, 44 Atl. 219, and other cases. It is clear from those decisions, and authorities cited in them, that there may be a valid devise to one for life with a power of disposition which will not affect the remainder over, unless the power is exercised as authorized, and as to any part of the estate upon which the power is not exercised the remainder is unaffected.

It is equally clear that the clause in the will last quoted does not of itself make these remainders contingent. The testator, having given his widow a power of disposition, naturally and properly spoke of his estate "remaining at the death of my said wife," but that would not convert what would otherwise have been a vested into a contingent remainder. The remain-

der may vest subject to the power, and the uncertainty as to whether the power be exercised as to all or part of the estate does not make it a contingent remainder. As was well said in Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; 34 N. E. 558: "If the remainder is contingent because it may consist of what remains after the exercise of the power of sale and use conferred upon the life tenant, then, in case the life tenant should fail to sell any of the estate or to exhaust for her own use any of the principal [148] thereof, the remainder would still be contingent because it would consist of what remains after paying off the charges created upon the property by the directions to pay the debts and the bequests. To hold that a remainder is contingent, because it cannot be known how much will be left until the debts and funeral expenses and other charges are paid, would make every remainder given by will a contingent one. But it is well settled that a devise to a person after the payment of debts and legacies is not contingent until such debts and legacies are paid, but confers an immediately vested estate: Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351. In such cases the remainder vests subject to the payment of debts and legacies and subject to the exercise of the power to use and sell, but liable to be devested as to so much of the estate as may be disposed of for the payment of the debts and legacies, and by the execution of the power. The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take": See, also, Heilman v. Heilman, 129 Ind. 59, 28 N. E. 310; Woodman v. Woodman, 89 Me. 128, 35 Atl. 1027; Burleigh v. Clough, 52 N. H. 267, 13 Am. Rep. 23, and other cases cited in 24 Am. & Eng. Ency. of Law, 389.

It is not necessary to go beyond our own decisions to find authorities on the subject, but the above quotation from Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558, seems to be very apt. In Tayloe v. Mosher, 29 Md. 443, the testator, after making certain devises, bequests, and dispositions in favor of his wife and servants, devised his estate not otherwise specifically disposed of to trustees. He directed them to pay certain annuities, and then to invest "the clear income of my estate, if anything remain after the application annually or otherwise of the several sums of money hereinbefore charged thereon," and provided: "Upon the death of my son William, I will and desire that a distribution

of my estate be made among all my grandchildren, to wit: The children of my late son James Mosher, and the children of my aforesaid son William, provided any child he shall leave. All my said grandchildren to take per capita." The [149] court said: "It is doing no violence to this language or to any rule of law to hold that the children of James, who were in esse at the date of the will and of the testator's death, took vested interests, liable to be devested pro tanto for the purpose of letting in for a share any child that William, who then had none, might, by possibility, have and leave surviving him. The fact that an estate is liable to be devested in whole or in part upon a contingency does not make it a contingent estate." See, also, Dulany v. Middleton, 72 Md. 67, 19 Atl. 146, for a similar decision. It would seem, then, to be clear that the reference to the estate "remaining at the death of my said wife" did not make the remainder contingent.

But it is argued, and was so held by the learned judge below, that the rest of this clause shows that the interests left to the children were contingent—that their right to participate in the distribution of his estate was contingent upon their surviving the testator's wife. But we cannot see how that clause indicates an intention on the part of the testator to create contingent remainders. The wife might in her lifetime have given one child more than she gave the other, and that child might have survived her mother, while the other, who received very little, might have died, without issue, before her mother. It would seem to be more in accordance with the intention of the testator, and more natural for him, to vest the remainder in his children at his death. We have seen what confidence he had in his wife's judgment and sense of justice, and he was willing for her to decide what was necessary to be expended for the support of herself and children, and for their education or advancement in life. He did not direct that any charge should be made against them for sums thus advanced in excess of what was given others, and, even if the remainder be treated as contingent, those thus favored might survive their mother and receive a share of the remaining property. The equality of distribution does not in any way depend upon whether the remainders were contingent or vested. It is a familiar but important rule that the law favors the early vesting of estates, and it is likewise a well-recognized rule of construction [150] that in doubtful cases the interest should be deemed to be vested in the first instance, rather

than contingent, unless the instrument under consideration does not admit of such construction. It cannot be doubted that Mr. Shriver did not intend to die intestate as to any part of his estate—he prefaced his will with the statement, "subject to the payment of my debts and funeral expenses I dispose of all my estate in manner and form following." Yet it was quite possible, although not probable, that all of the children by his second wife might have died without leaving issue before his wife died, and in that event there would have been an intestacy as to the remainder, if it must be regarded as contingent. The children provided for during the lifetime of his wife—"our children," that is those of his second wife and himself—were the same who were referred to in the clause under consideration—"my children by my said wife." Mrs. Reese was one of those children, and left two children, who would admittedly have been entitled to their mother's share if they had survived their grandmother. The testator did not leave the remainder to such of his children as survived his wife, or to such children and grandchildren (children of a deceased child) as survived her. He did make provision in that clause for the share and interest of a deceased child who had died leaving a child or children, but made none as to the share of a deceased child who died without leaving issue. The provision that "the child or children of a deceased child shall stand in its or their parent's place and stead and receive and have the share and interest its and their parent would have been entitled to if living" is not of controlling effect on this question by reason of the use of the words "receive and have." That was speaking of the period of distribution, and whether vested or contingent, the remaindermen were not entitled to "receive and have" their shares until that time arrived. The trustee was to receive, have and hold the estate until then, excepting such part as she previously disposed of under the other provisions of the will. Without further discussion of this clause it is sufficient to say that we do not find anything in it which necessarily indicates [151] an intention on the part of the testator to create contingent remainders, and it will be well to now see what this court has said about the effect of similar or analogous provisions in other wills.

In Meyer v. Eisler, 29 Md. 28, the testator, after making certain bequests and legacies, gave all the rest of his estate to his wife and another in trust, to hold the same with the surplus or unappropriated revenue or income arising from the

same, etc. He then authorized them to receive all rents, issues, interest and profits arising or growing out of the property, and from the amounts so received to pay insurance, taxes and repairs, and out of the residue to pay his wife for her use and benefit one-third part, and directed the balance of the income to be invested in Baltimore City stock to be held in trust with the other property, until the end of twenty years after his death, or until his youngest child should arrive at the age of twenty years, and then the whole, including principal and interest, to be divided and paid over as follows: To his wife one-third part "and the other two-third parts to all my children, share and share alike; and in the event of the death of either of my said children, leaving lawful issue, such issue to have and receive the share or proportion that the deceased would have been entitled to if living." He then provided for a similar distribution of the third left to his wife, in case she "shall be dead at the time of such division." Elizabeth, one of the children, after the testator's death, married John Rose, and subsequently died before the time had arrived for a division of the estate, intestate and without issue. The widow also died before that time. This court held that the children took a vested interest in the property devised to them, and that John Rose, as husband of Elizabeth, was entitled under the statute then in force to a life estate in her share of the realty, and absolutely to her share of the personalty. That case is strikingly similar to the one under consideration, and has been fully approved in Tayloe v. Mosher, 29 Md. 443, Small v. Small, 90 Md. 550, 45 Atl. 190, and Daughters v. Lynch, 93 Md. 305, 48 Atl. 1055, and other cases.

[152] In Cox v. Handy, 78 Md. 108, 27 Atl. 227, 501, the testator left certain real and personal property to his wife for life, and his will contained this clause: "It is my will that after the death of my wife, Mary Ann Handy, all the property devised to her for life shall be sold if necessary for equal partition, or if the same can be accomplished without a sale, shall be divided amongst my children, share and share alike, the child or children of any deceased child to take the portion to which the parent, if living, would have been entitled." This court held, "that a share of the property vested in each of the children of William W. Handy, who survived him, but if any such child should leave children at his death, his share was devested in favor of his children; and that it was not devested by the death of the child in the

lifetime of the tenant for life without leaving children," and in the opinion delivered after a motion for reargument it was said: "A share of the property vested in each of the children who were living at the time of his death, and if any child died before the period of distribution, leaving children, they were substituted in his place; his share, however, was not devested if he left no children, but it went to his representatives." That case has been recently approved in Hoover v. Smith, 96 Md. 393, and In re Rogers' Trust Estate, 97 Md. 674, 55 Atl. 679.

The cases we have cited would seem to conclusively show that these remainders were vested and not contingent. This opinion has already reached such length as to make it undesirable to attempt to discuss in detail the authorities relied on by the appellees—such as Demill v. Reid, 71 Md. 175, 17 Atl. 1014; Larmour v. Rich, 71 Md. 369, 18 Atl. 702; Small v. Small, 90 Md. 550, 45 Atl. 190. In the latter Judge Fowler referred to Larmour v. Rich, and said: "The distinction is clearly drawn between that class of cases where the estate or interest vests at the death of a testator, because of an absence of any expressed intention that it vest later, and those where the testator by his will fixes a more distant period for the vesting." It is sufficient to say that in our opinion the testator did not by his will express or indicate an intention that the remainder of his estate should not vest until after his [153] wife's death. In the very recent case of Ridgely v. Ridgely, 100 Md. 230, 59 Atl. 731, many of the cases affecting this question are cited. Engel v. State, 65 Md. 539, 5 Atl. 249, Small v. Small, 90 Md. 550, 45 Atl. 190, and Larmour v. Rich, 71 Md. 369, 18 Atl. 702, are there included in the class of cases where gifts were made for life and then over to survivors—in which cases the period of survivorship is generally referred to the period of distribution and not the death of the testator. There is no reference to survivorship in this will. In Daughters v. Lynch, 93 Md. 305, 48 Atl. 1055, we repeated what had been said in Tayloe v. Mosher, 29 Md. 443, that, "estates will be held to be vested wherever it can fairly be done without doing violence to the language of the will, and to make them contingent there must be plain expressions to that effect, or such intent must be so plainly inferable from the terms used as to leave no room for construction." We are therefore of the opinion that the court erred in rejecting the claims of Margaret A. Landon and Clymer

Whyte, administrator, for the shares claimed by them respectively—the one being for this interest in the real property, and the other for that in the personalty distributed.

2. This brings us to the consideration of the appeal of Margaret L. Roberts. Having held that the children of Mr. and Mrs. Shriver took vested estates, it will not be necessary to determine whether a deed of trust such as that made by Mr. and Mrs. Roberts to Messrs. Reindollar and Roberts, trustees, would include a contingent remainder. The appellant contends that the deed of trust did not pass the interest of Mrs. Roberts for several reasons which we will briefly refer to.

(a) It is claimed for her that it does not contain a description of the real estate sufficient to identify it with reasonable certainty, as provided in section 9 of article 21 of the Code. The description in the deed of trust is "all and singular the real and personal estate, wheresoever situate, ... and all other property of every nature, kind and description and wheresoever situate (except so much thereof as is exempt from execution) of us the said" William and Margaret. It is difficult to understand how it would be possible to identify property intended to be conveyed more thoroughly than is 154 done by that description. The intention manifested on the face of the deed was to convey and assign all of their property of every nature, kind and description. If they had undertaken to specify it, some might have been omitted and to show on the face of the deed that they intended to make an assignment of all property, it would have been necessary to have added some such clause as the one that was inserted. This court decided in Maughlin v. Tyler, 47 Md. 545, and other cases, that a deed of trust for the benefit of creditors, creating preferences and exacting releases, is void unless it appears on its face to convey all the property of the debtor. It is true this deed does not create preferences or exact releases, but if the position of the appellant be correct as to the effect of this statute, if would be difficult to ever comply with the requirements of the law as announced in Maughlin v. Tyler, 47 Md. 545. If a grantor intends to convey part of his property, of course he must describe it specifically, but if he intends to convey all of it and uses such language as is in this deed, who could be misled or in doubt as to what he conveyed? The object of section 9 is to require sufficient notice to the public and certainty as to what is conveyed.

As well might it be required of a testator to specify his property in detail in a residuary clause in his will as to require a debtor making an assignment for the benefit of his creditors to do so. This statute has never been construed to require a schedule or list of the grantor's property to be set out in such a deed, and so far as we are aware it is the universal custom throughout the state to use terms similar to those in this deed, when it is intended to make a general assignment of all the debtor's property. In Carey's Forms of Precedents, page 371, a very similar description of property is given for such a deed of trust, and there have been many cases in this court where such descriptions were given, and never questioned. The case of Farquharson v. Eichelberger, 15 Md. 63, is conclusive of the question. It is said by the appellant that as it was decided prior to the act of 1856, chapter 154, section 24, which is now the section of the code above mentioned, the effect of the statute was to change that decision. [155] But that was "An act to simplify and abridge the rules and forms of conveyances," and if such a description was valid before the rules and forms were simplified, surely it is now. In our opinion the statute does not in any wise invalidate this instrument.

(b) It is further contended on behalf of Mrs. Roberts that the deed of trust only conveyed the joint estates of her husband and herself—that she united in the deed simply to convey her potential right of dower. We find nothing in the deed that sustains that contention. It recites that they are "indebted unto sundry persons and corporations in several sums of money, and being unable to pay the same in full have proposed and agreed to assign all our property in trust for the benefit of our creditors, as hereinafter mentioned." It then assigns the property as we have stated, and after giving the trustees authority to convert it into money and providing for costs, etc., directs them "to apply the residue of said moneys in payment of the several debts due to the creditors aforesaid of us, the said William Jesse Roberts and Margaret L. Roberts, his wife, pari passu, and without any preference or priority of payment," and after the payment of debts, costs, expenses and commissions, "then in trust to apply the surplus (if any), unto the said William Jesse Roberts and Margaret L. Roberts," etc. It seems clear to us, therefore, that Mr. and Mrs. Roberts not only conveyed and assigned any property owned by them jointly, but all they

owned individually. Whether or not she owed any individual debts which are entitled to be paid we have no means of knowing, and we do not intend to determine how the money realized from her father's estate is to be distributed by the trustees. That can be disposed of in the proceeding in which they make distribution.

(c) After having determined that the interests of the children of Mr. Shriver under his will were vested remainders, we do not deem it necessary to discuss at length the question as to whether Mrs. Roberts' interest passed by the deed of trust as we think it did. A vested remainder can be devised, mortgaged [156] or conveyed. It also is liable to execution by a judgment creditor: Armiger v. Reitz, 91 Md. 334, 46 Atl. 990. We are of the opinion, therefore, that Mrs. Roberts' interest should be distributed to the trustees named in the deed of trust, and it can then be determined what creditors are entitled to it. As the court below so decided, although on a different ground, as to Mrs. Roberts' interest, that part of the decretal order will be affirmed, but as we do not agree with the court as to the interest that would have gone to Carrie Reese, and is now claimed by Margaret A. Landon and Clymer Whyte, administrator of Augustus Shriver Reese, and of William Reigart Reese, the portion of the order appealed from by them will be reversed. Of course we do not mean to disturb the portions of the decretal order not appealed from.

Decretal order affirmed in part and reversed in part—the costs in No. 18 (office docket) to be paid by the appellant in that case, including one-half of the cost of transmitting and printing the record, and the costs in No. 19 (office docket) to be paid out of the estate of Augustus Shriver, including the other half of cost of transmitting and printing the record (one-half by the trustees and the other by the receiver)—and cause remanded for further proceedings in accordance with this opinion.

For Authorities in point upon the questions involved in the principal case, see Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, and cases cited in the cross-reference note thereto.

BERNHEIMER BROTHERS v. BECKER.

[102 Md. 250, 62 Atl. 526.]

APPEAL AND ERROR—Waiver.—An Exception to the Refusal of the Judge to Withdraw the Case from the Jury at the close of the plaintiff's evidence is lost by the defendants going on with their case, and failing to raise the question, by asking for the same instruction at the close of the whole testimony. (p. 357.)

IMPRISONMENT—What is.—Every deprivation of liberty of another without his consent, whether by violence, threats or otherwise, constitutes imprisonment within the meaning of the law. (p. 359.)

ARREST, Authority of an Agent to Make or Authorize.—An agent or an employé of an ordinary business has no implied authority to make an arrest. This principle extends to the manager of a department of a department store. (p. 360.)

PARTNERSHIP—Authority of One Partner to Bind the Firm by a Wrongful Act.—One of several partners cannot draw the firm or his copartners into a trespass by giving authority for the doing of an unlawful act in the name of the firm; for one partner has no power to bind the firm as to the commission of a wrongful act without the previous consent or subsequent concurrence of all the partners. (p. 361.)

PARTNERSHIP, When not Liable for an Arrest.—If a partnership is engaged in the keeping of a department store, and one of the partners authorizes or ratifies the arrest of a customer on the charge of stealing an article of goods for sale in such store, the firm and the other copartners are not liable for such arrest if they do not previously authorize nor subsequently ratify it. (p. 361.)

DAMAGES, Exemplary.—An instruction in an action to recover for a wrongful arrest to the effect that if the jury finds for the plaintiff, they may award exemplary damages, is too broad, if, in connection with other instructions, it does not require the jury to find, as a condition of awarding such damages, that the alleged wrong to the plaintiff had been inflicted maliciously, wantonly and with circumstances of contumely and indignity. (p. 361.)

PARTNERSHIP—Ratification by a Partner of an Unlawful Arrest When not Shown.—When a customer in a department store is wrongfully arrested on a charge of stealing an article for sale therein, a partner who is not present at the arrest and not in any way connected with it, who, on being complained to by the husband of the person arrested, orders him out of the store, does not thereby show concurrence in, or ratification of, the wrongful act so as to make himself answerable therefor. (pp. 361, 362.)

Plaintiff's second request for instructions granted by the court was as follows:

"That if the jury find from the evidence that the plaintiff was on the second floor of the store of the defendants in Baltimore City as a prospective purchaser for the purpose of buying shoes, and was at a counter containing shoes and had a pair of shoes in her hand, and walked to

another counter close by and was there looking over other shoes, and Leo Seligman, one of the employés of the defendants, and acting as the agent and servant of the defendants, and within the scope of his authority, and in charge of the said shoe department (if they shall so find) approached the plaintiff and grabbed her by the arm and said, 'I've got you now,' and the plaintiff freed herself from his grasp and walked away for the purpose of finding Mr. Bernheimer, and had reached the first floor of said store, and the said employé came after her and again violently took her by the arm and said 'You come with me,' and the plaintiff refused and he forced her to go with him upstairs again to the second floor and into a small room; and into the presence of Herman Bernheimer, one of the defendants, and that when the plaintiff was in said room the said employé at the direction of Herman Bernheimer, forcibly took hold of the plaintiff's gossamer and unbuttoned it, and forced her to take it off, and that Herman Bernheimer was in the said room during all of that time, and when the said employé had compelled the plaintiff to remove her said clothing that Herman Bernheimer said, 'You are all right; you can go now,' then the plaintiff is entitled to recover."

Randolph Barton, Jr., for the appellant.

John C. Kumpf and Richard A. Miller, Jr., for the appellee.

252 SCHMUCKER, J. The appellee, Lena Becker, sued the appellants individually and as copartners in the court of common pleas of Baltimore City for damages for an assault and battery and a false arrest and imprisonment. The two causes of action were alleged in separate counts in the narratio. The appellants as defendants below pleaded non cul. The trial of the case resulted in a judgment for the plaintiff from which they appealed.

Two exceptions appear in the record. The first was taken to the court's refusal to withdraw the case from the jury at the close of the plaintiff's testimony, but the defendants lost the benefit of that exception by going on with their case and failing to again raise the question by asking for the same instruction at the close of the whole testimony: Barabasz v. Kabat, 91 Md. 53, 46 Atl. 337; State v. Baltimore etc. R. R., 101 Md. 359, 61 Atl. 189.

The second exception brings up for review the rulings of the lower court on the prayers offered at the close of the case and the special exceptions taken to some of them. In order to properly pass upon the questions presented by this exception it will be necessary to advert to the more important facts appearing in the evidence. It appears from the record that the appellants, Ferdinand and Herman Bernheimer, as copartners, conduct a department store in Baltimore City, and Leo Seligman is the manager of their shoe department. There is also evidence in the record tending to prove the following facts. On March 14, 1904, the appellee having gone to the Bernheimer store to purchase shoes for her infant child, selected a pair from a lot of shoes exposed for sale upon a counter and then started with the pair which she had selected in her hand, to go to a nearby counter to select another pair from the shoes thereon exposed for sale. As she was leaving the first counter Seligman walked up, caught her by the arm and [253] compelled her, against her protest and attempted resistance to go with him to the elevator and upstairs and into a room into which Herman Bernheimer, one of the defendants, entered at the same time. Seligman said something, which the plaintiff did not hear, to Bernheimer, who replied to him, "You search her." Seligman thereupon, without her permission or assistance, took off her gossamer, opened her coat and took it off and opened her skirt. Nothing having been found on her Bernheimer said, "She is all right; leave her go." She put on her clothing and went home and told her husband of the occurrences, and showed him bruises on her arm which she said were made by Seligman's rough handling of her. Her husband went to Bernheimer Brothers' store where he saw Mr. Ferdinand Bernheimer and complained of what had happened to his wife. Mr. Bernheimer went upstairs and found out what he wanted and came down again and ordered the husband off the premises and gave him no satisfaction.

There was, on the contrary, evidence directly contradicting the plaintiff's account of the treatment she received at the store and tending to prove that she had taken the pair of shoes from the counter, put them under her cape and started to walk away, not toward the other shoe counter but toward the elevator. Seligman's attention having been called to her actions, by an employé of the store who had seen them, he followed her and when she got near the door she turned and

dropped the shoes. Seligman picked them up, whereupon she said to him, "I never did anything like that before. I hope my husband won't find it out," and voluntarily went with him to the office on the second floor, where she paid for the shoes and he wrapped them up for her and she carried them away. Seligman and Herman Bernheimer both positively testified that neither they nor anyone else had searched or even taken hold of her at any time at the store.

At the close of the case the plaintiff offered eight prayers, of which the court granted the first, second and third A and refused the others. The defendant offered nine prayers, of which the court granted the fifth and refused the others. The [254] plaintiff specially excepted to two of the defendants' rejected prayers and the defendants specially excepted to four of the plaintiff's rejected prayers and also to her second and third A prayers which were granted and their exceptions were overruled. It is unnecessary for us to notice the special exceptions of the respective parties to prayers which were subsequently overruled.

There was no error in granting the plaintiff's first prayer which merely declared that any deprivation of the liberty of another without his consent, whether by violence, threats or otherwise, constitutes an imprisonment within the meaning of the law.

The plaintiff's second prayer, which was also granted, does not correctly state the law of the case, in that it directs the jury that if they find the facts therein stated the plaintiff is entitled to recover generally, without limiting her right to a recovery against Herman Bernheimer. The facts which the prayer requires the jury to find are her arrest by Seligman and her detention and search by him in the presence and by the direction of Herman Bernheimer, and also that Seligman in the transactions mentioned was "acting as the agent and servant of the defendants and within the scope of his authority and in charge of said shoe department" of their store. Ferdinand Bernheimer is not mentioned in the prayer, nor is any supposed concurrence in or ratification by him of the acts complained of mentioned or relied upon therein. The jury are not instructed as to what state of facts would, if found by them from the evidence, justify the conclusion that Seligman acted within the scope of his authority as the agent of the defendants in his conduct toward the plaintiff. Even if we assume that the prayer was intended to designate as authority

for such a conclusion by the jury the finding by them of the fact that Seligman was at the time in charge of the shoe department or that some of the alleged acts were committed in the presence of Herman Bernheimer, one of the partners of the defendant firm, the instruction would still be erroneous.

The prayer mentions no facts tending to prove that the defendant [255] firm conferred express authority on Seligman to arrest and search customers who came to the store when he suspected them of stealing. This court has repeatedly decided that an agent or employé about an ordinary business has no such an implied authority: Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311; Tolchester Imp. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846.

In Central R. R. Co. v. Brewer, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63, this court, in holding that an employé had no implied authority to do any acts not relating to his own particular duties, said: "In Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448, the question was whether a merchant by employing a clerk to sell goods for him in his absence or a superintendent to take the general charge and management of his business at a particular store thereby confers authority upon such clerk or superintendent to arrest, detain and search anyone suspected of having stolen and secreted about his person any of the goods kept in such store. The court says: 'In examining this question it must be assumed that by the employment the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property to protect it against thieves and marauders and that the servant owes the duty to so protect it to his employer. But this does not include the power in question. The master would not if present be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person.' The master could, of course, confer no greater power upon the servant than he himself possessed. Brewer's case has been cited and relied on by us in the more recent cases of Barabasz v. Kabat, 86 Md. 23, 37 Atl. 720; Turnpike Road v. Green, 86 Md. 161, 37 Atl. 642; Carter v. County Commrs. of Worcester Co., 94 Md. 621, 51 Atl. 830."

If the court below intended by granting the plaintiff's second prayer to authorize the jury to find a verdict against Ferdinand Bernheimer because his copartner, Herman Bernheimer, was present at and abetted the detention and search

of the plaintiff, if they found the fact of such presence and abetting, that also was error, for a partner in an ordinary mercantile business has no implied power to bind his copartner [256] in such transactions as those which form the basis of the present suit. In Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089, a case closely resembling the present one, we distinctly held, upon a review of the authorities, that "one of several partners cannot drag the firm or his copartner into a trespass by giving authority for the doing of an unlawful act in the name of the firm of which he is a member; for one partner has no power to bind the partnership to the commission of a wrongful act without the previous consent or subsequent concurrence of all of the partners."

The plaintiff's third A prayer, which was granted, instructs the jury that if they "find for the plaintiff, then they may award such damages as will not only compensate the plaintiff for the wrong and indignity she has sustained in consequence of the defendant's wrongful acts, but they may also award exemplary or punitive damages as a punishment to the defendant for such acts." That instruction following the preceding two prayers of the plaintiff was too broad because it did not require the jury to find as a condition of awarding punitive damages that the alleged wrongs to the plaintiff had been inflicted maliciously or wantonly or with circumstances of contumely and indignity: Sloan v. Edwards, 61 Md. 89. The court by the plaintiff's first prayer had instructed the jury that any deprivation of the liberty of another without his consent constituted an imprisonment within the meaning of the law, and therefore the instruction to them as to the measure of damages should have plainly stated the further facts to be found by them as a proper ground for the award of punitive damages in the event of their finding a verdict for the plaintiff.

We think also that the defendant's second and a-half prayer which was refused should have been granted. It instructed the jury that there was no legally sufficient evidence to entitle the plaintiff to recover as against the firm of Bernheimer Brothers or Ferdinand Bernheimer. The only testimony in the record directly connecting Fedinand in any manner with the alleged wrongful acts of his brother Herman or Seligman is that of the plaintiff's husband. He testifies that when he, being naturally [257] mad and excited, complained to Ferdinand Bernheimer of the treatment which Mrs. Becker had

received at the store he (Bernheimer) "went upstairs, came down again and ordered him [Becker] out of the store." This testimony, if true, undoubtedly convicts Bernheimer of rudeness of manner but it does not of itself tend to prove a concurrence in or ratification by him of the alleged wrongful acts of Seligman and Herman Bernheimer.

Without discussing in detail the defendants' other rejected prayers, it is sufficient to say that we find no reversible error in their rejection.

For the erroneous action of the court below in granting the plaintiff's second and third A prayers and rejecting the defendants' second and a-half prayer the judgment must be reversed and a new trial awarded.

Judgment reversed with costs and a new trial awarded.

The Liability of the proprietor of a store, where his employé detains and searches a person whom he believes guilty of theft, is discussed in Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909; and in the monographic note to Crane v. Bennett, 101 Am. St. Rep. 744-750. Generally speaking, every restraint upon a man's liberty is, in the eye of the law, an imprisonment, and, if not justifiable, is false imprisonment: Goodell v. Tower, 77 Vt. 61, 107 Am. St. Rep. 745. False imprisonment is the subject of a monographic note to Tryon v. Pingree, 67 Am. St. Rep. 408-427.

WEST MARYLAND RAILROAD COMPANY v. BLUE RIDGE HOTEL COMPANY.

[102 Md. 307, 62 Atl. 351.]

CORPORATIONS—Contracts Ultra Vires not Cured by Words Intended to Disguise Their Purpose.—The fact that a railway company stipulated to allow such sums as commissions on its receipts as would make good a specified deficiency cannot disguise the real character of the transaction and control the validity of the obligation. If the contract would be ultra vires if the deficiency were to be made good from the general receipts, it cannot be rescued from invalidity by calling payment commissions from the traffic receipts. (p. 366.)

CONTRACTS FOR COMMISSIONS, What is not.—A contract, the effect of which may be to pledge the gross receipts of a railway corporation from any source, cannot be regarded as a commission or rebate from the gross receipts, though so styled by the parties to the contract. (p. 366.)

A CORPORATION Possesses Only Such Powers as are expressly granted, with such incidental and implied powers as are necessary to carry into effect those expressly granted. (p. 367.)

AN INCIDENTAL POWER of a Corporation is One that is directly and immediately appropriate to the execution of the specified

powers granted, and not one that has only a slight or remote relation to it. It can in no case enlarge the express powers, and thereby warrant the corporation in devoting its efforts or capital to other purposes than such as its charter expressly authorizes, or engaging in collateral enterprises not directly, but only remotely, connected with its specific corporate purpose. (p. 367.)

RAILWAY CORPORATION, Power of to Run a Summer Hotel. A corporation empowered by its charter to construct a railway between specified points, together with all buildings, stations, and other works and accommodations necessary and convenient and to aid any other company in the construction of its road by means of subscriptions to its capital stock or otherwise, and to consolidate with any corporation owning a railroad or railroads and other property, has no power to engage directly in the construction and operation of a summer hotel, or to lend its credit to any corporation engaged therein. (p. 368.)

RAILWAY CORPORATIONS—Ultra Vires Contract Relating to Summer Hotel.—A contract by which a railway corporation guarantees the payment of interest and dividends on the bonds and stock of a hotel company on the line of its road is ultra vires and void, though it is expected that the construction and operation of such hotel will greatly increase the receipts of the railway, and the moneys pledged to make the guaranty good are in the contract designated as receipts or commissions upon receipts of the railway corporation for freight and charges to and from stations in close proximity to such hotel. (pp. 371, 372.)

CORPORATIONS—Ultra Vires—Receipts of Fruits of Contract Which Will not Estop Pleading of.—When a railway corporation has entered into a contract guaranteeing the payment of interest and dividends on the bonds and stock of a summer hotel company, the fact that the former corporation has benefited from increased receipts from freight and passengers due to the construction and maintenance of the hotel will not estop it from pleading that its contract is ultra vires. To create such an estoppel the moneys received must have come from the other party to the contract. (p. 376.)

Benjamin A. Richmond, Leon E. Greenbaum and George R. Gaither, for the appellant.

William S. Thomas, N. Winslow Williams, Henry W. Williams and Edward C. Gibson, for the appellee.

321 PEARCE, J. This is an action of covenant brought by the Blue Ridge Hotel Company of Washington county, a corporation organized under the general incorporation laws of Maryland, against the Western Maryland Railroad Company, a corporation created by an act of the General Assembly of Maryland, chapter 304 of 1852, under the name of "The Baltimore, Carroll, and Frederick Railroad Company," the name being changed by chapter 37 of 1853 to "The Western Maryland Railroad Company." The covenant sued upon is contained in a sealed agreement between the parties, made October 23, 1883. This agreement recites the making of a

previous agreement between the parties on April 2, 1883; whereby the said railroad company, in consideration of anticipated advantages to it from the construction by the said hotel company of a summer hotel near Pen Mar Station on the line of said railroad, had agreed to secure the payment of a dividend not exceeding five per centum per annum on the capital stock of said hotel company of one hundred thousand dollars. The agreement sued on then further set forth that since the erection of said hotel, the railroad company had in fact derived large receipts from travel and traffic to and from the station used for said hotel, known as the Blue Mountain Station, and that its receipts from travel and traffic to and from an adjoining station, known as Pen Mar Station, had, by reason of the attractions of said hotel and its neighboring property, increased to an amount exceeding the utmost liability to be assumed by it, under the contract then made, and that it was believed these receipts would be largely augmented by increasing the capacity of the hotel, and by the improvement of the grounds of the hotel company, and of its other property near Pen Mar Station; that the hotel company had already expended in the undertaking more [322] than its whole capital, and an additional amount, not less than $125,000 was necessary to complete improvements begun, and others contemplated, which could not be procured without the assistance to the credit of the hotel company as thereafter stipulated in said agreement; that the hotel company was about to issue its bonds to an amount not exceeding $125,000 bearing interest at the rate of six per cent per annum and to be secured by a first mortgage upon the said hotel and its revenues, and such other of its property as should be described in said mortgage. The agreement then further set forth that in consideration of the advantages expected to accrue to the railroad company from the said improvements to the hotel and its other property, and of certain privileges secured to the railroad company by the terms of said agreement for the benefit of its excursionists, the said railroad company covenanted with the said hotel company, as follows: "That if in any one year the actual net earnings of said hotel company from said hotel and other sources shall not suffice to pay five per cent dividend upon its capital stock of $100,000, and the interest at the rate of six per cent, semi-annually, upon such amount of said first mortgage bonds as may be issued for the purposes herein stated, not exceeding $125,000, the said rail-

road company will, in that event, allow and pay to said hotel company for its stockholders, and the holders of said bonds, such commissions upon its receipts from traffic to and from Blue Mountain and Pen Mar Stations, or any other station or stations which may be hereafter substituted for either, or both, of the above, at which the business hereby contemplated may be done, as will be sufficient to make up said deficit to five per cent upon its capital stock, and six per cent per annum upon its bonded debt''; and the hotel company upon its part entered into a covenant designed to protect the railroad company in the proper application of the revenues of the hotel company to its economical and successful management, and of the net earnings to the dividends and interest due to its stockholders and bondholders. The declaration averred that in reliance upon this covenant of the railroad company, it issued its bonds [323] to the amount of $125,000, of which $122,000 were still outstanding, which sum was expended in the improvements contemplated by the agreement, and that at the close of the fiscal year of the hotel company ending October 1, 1903, the net earnings of the hotel company were not sufficient to pay the interest then due on said bonds, by the sum of $3,660, and there was nothing available for payment of the $5,000 dividend then due to its stockholders that demand had been duly made on defendant for said sums, and that payment had been refused.

It will only be necessary to consider the defendants' fourth plea which averred that the agreement sued on was ultra vires on the part of the railroad company, and void, and could not be enforced by suit such as was brought against it. To this plea the plaintiff demurred, and the demurrer being sustained, the case went to trial on issues joined on the other pleadings, resulting in a verdict for the plaintiff for $9,433.68, and judgment thereon. The defendant offered six prayers, of which the first and second raised the same question raised by the demurrer, and were refused by the court, no prayers being offered by the plaintiff.

The question raised by the demurrer, and by the defendant's first and second prayers, is the vital question in the case, and will now be considered.

The agreement was drawn with much care and skill, and evidently with a view to the avoidance of the question raised, as is suggested by the phraseology of the covenant ''to allow and pay such commissions upon its receipts to and from'' the

station named as would make good the deficit which was the subject of the covenant, but we do not think the use of this language can disguise the real character of the transaction, or control the validity of the obligation assumed by the railroad company. If the contract would be declared ultra vires if the deficit were to be made good from the general receipts of the company, it could not be rescued from invalidity, by calling the payment to be made commissions from traffic receipts from the particular stations named. There is no limit to the rate [324] of commission to be paid. The full amount of the gross receipts from these two stations was pledged by that covenant if required to make good this deficit. This appears not only from the language of the covenant, but even more explicitly from the recital of the mortgage from the hotel company to the trustees of its bondholders, which assigns to said trustees "the benefit of the contract between the hotel company and the railroad company, dated October 23, 1883, by which the payment of the interest on the said bonds is guaranteed by the said railroad company to be paid of the receipts from the traffic at Blue Mountain and Pen Mar Stations." A contract which in effect pledges the total gross receipts from any source cannot be regarded as a contract for commissions on, or a rebate from, those gross receipts, and this contract must be regarded as an absolute guaranty to the stockholders and bondholders of the hotel company of their dividends and interest, to the extent to which the receipts from the stations named should be adequate for that purpose, since in the language of the contract, the payment was to be made "to the hotel company for its stockholders and bondholders." The promise thus made was a promise "to answer for the payment of some debt, or the performance of some duty, in case of the failure of another, who is himself, in the first instance, liable to such payment or performance": 14 Am. & Eng. Ency. of Law, 2d ed., 1128. Its object, as declared in the recitals of the agreement was to furnish to the hotel company "assistance to its credit," and it was at least twice designated in said agreement as a "traffic guaranty," and we think it could not be accurately otherwise designated. It is therefore necessarily a collateral contract, but there is no question here of the statute of frauds, and it would make no difference, so far as its validity is here concerned, if it had been an original contract to pay the hotel

company a lump sum upon the consideration stated. The question of ultra vires would still remain for consideration.

Corporations, being mere creatures of law, possess only such powers as are expressly granted, together with such incidental [325] and implied powers as are necessary to carry into effect those expressly granted. "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has only a slight or remote relation to it. It can in no case avail to enlarge the express powers, and thereby warrant the corporation to devote its efforts or its capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises, not directly, but only remotely connected with its specific corporate purposes": 10 Cyc. 1097, 1098. And it is equally well settled that "a corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary, or usual in the conduct of its business": 7 Am. & Eng. Ency. of Law, 2d ed., 188.

The original charter powers of the Western Maryland Railroad Company are found in sections 14, 15 and 18 of chapter 304 of the acts of 1852. In addition to the mere power to construct a railroad from Baltimore to Westminster, and thence to some point on the Monocacy river in the direction of Hagerstown, the additional powers given are to erect warehouses or other works necessary to said road, and to contract with the Susquehannah Railroad for intersecting its road; to carry the mail and to borrow money not exceeding $200,000.

Chapter 71 of 1872 gave the power to construct a railroad from the western end of the tunnel of the Baltimore and Potomac Railroad to Williamsport or to Cumberland together with all buildings, stations, other works and accommodations necessary or convenient for the operation of said road, and to execute mortgages upon its property for building the road. Section 8 of that act, which is specially referred to by the court below in the ruling upon the demurrer, set out in the record, gives power to aid any other company in the construction of its railroad, by means of subscription to its capital stock, or otherwise, for forming a connection therewith, and to consolidate with any other corporation owning a railroad, or a railroad [326] and any other property; and chapter

153 of 1884 gives the only power of guaranty it possesses, and limits this power to the obligations of other railroad companies.

In none of these acts do we find any power, express or implied, either to engage directly in the construction and operation of a summer hotel, or to lend its credit to any other corporation engaged therein, while the acts of 1872 and 1884, supra, seem to us, by their express limitation of the powers granted to dealing with railroad companies, or companies "owning a railroad and other property," to exclude the power to engage in any other business than that of a railroad, or to guarantee the obligations of any other corporation than a railroad corporation. However the strict rules which we have cited above may have been relaxed or evaded elsewhere under the influence of competition in trade and commerce and of the modern theories of expansion of power in every direction, they are still approved by text-writers of the highest authority and have been always observed and enforced by the court in this state.

Judge Seymour D. Thompson, in 10 Cyclopedia, 1146, says: "Perhaps the most general statement which can be made of the doctrine of ultra vires is to say that the contract of a corporation which is unauthorized by or in violation of its charter, or other governing statute, or entirely outside the scope of the purposes of its creation, is void, in the sense of being no contract at all, because of a total want of power to enter into it." And Mr. France in his recent excellent work on the Elements of Corporation Law, section 72, says: "The transaction may be beyond the powers of the corporation, simply because it is foreign to the purposes expressed or implied in the charter; it may invoke the exercise of a power, not forbidden, but simply ungranted, as, for example, where a railroad company undertakes to guarantee the expenses of a public festival. In the better usage, the term ultra vires is limited to acts of the latter class, and many of the courts make a distinction between transactions which are illegal, because forbidden, and those which are simply in excess of the granted powers."

327 In Pennsylvania Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543, the court said: "In Angell and Ames on Corporations it is justly observed that a corporation and an individual stand upon very different footing. The latter, existing for the general good of society, may do all

acts and make all contracts which are not in the eye of the law inconsistent with the great purpose of his creation; whereas the former, having been created for a specific purpose, cannot only make no contract forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding therefore whether a corporation can make a particular contract, we are to consider in the first place, whether its charter or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, then, in the second place whether a power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence, or whether the contract is entirely foreign to that purpose." It was accordingly there held that the navigation company being incorporated only for the purpose of conveyance of passengers and freight, could not lawfully enter into a contract for breaking ice upon the waters navigated by its vessels, and towing other vessels through the track so made. And in Abbott v. Baltimore etc. Steamboat Co., 1 Md. Ch. 542, where the company was incorporated solely for the same purpose between Baltimore and Fredericksburg, but entered into an obligation in aid of an enterprise to improve the navigation of the river near Fredericksburg upon its own route, which would result to the great advantage of the company, it was held that the contract was not within its express or implied powers, and could not be enforced against it, though the obligee had incurred large expenses upon the faith of the contract. In the latter case the chancellor followed the decision in Pennsylvania Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543, and that case has been repeatedly approved in this court, upon the point [328] here involved, the latest instance being in Boyce v. Trustees M. E. Church, 46 Md. 359. In State v. Baltimore etc. R. R., 48 Md. 49, one of the questions was whether the receipts from certain hotels built and owned by the railroad company were subjected to the gross receipts tax imposed by the act of 1872 upon such railroad companies, and the court in construing the language employed in the power granted "to erect warehouses and other works necessary and expedient for the completion and operation of the road," said on pages 76 and 77: "Hotels

or buildings for the accommodation of passengers over the road are, we think, necessary to its business and therefore within its charter. The gross receipts therefore from these hotels are exempt from taxation. The Oakland and Deer Park hotels, however, appear to have been built and are now used primarily as places of summer resort, and although as such they may attract travel over the road, they are not in any sense necessary to its operation. But the receipts from these hotels are not liable to the tax imposed by the act of 1872, because they are not derived from the exercise of any franchise granted by the state, and they must be taxed according to valuation as other property." The court had previously said upon the same page, "It is hardly necessary to say that the original charter does not authorize the appellee to build and conduct hotels in the usual and ordinary manner in which hotels are kept, that is for the accommodation of the public generally." The power to build and conduct such hotels was not actually before the court under any of the pleadings in that case, and the language last cited therefore may perhaps be regarded as obiter, but the application of the gross receipts tax to such hotels was before the court, and it was held not to apply to them because "the receipts were not derived from the exercise of any franchise granted by the state"—in other words, because the charter did not, either expressly or by implication, grant the power to engage in that business.

The cases we have cited from our own courts sufficiently show how the law has been held in this state, and they are in [329] accord with the best-considered cases elsewhere in this country and in England. Thus in Davis v. Old Colony R. R., 131 Mass. 258, 41 Am. Rep. 221, in which the subject was exhaustively considered by Judge Gray, it was held beyond the power of a railroad corporation chartered by the legislature, or of a corporation organized under the general law for the manufacture and sale of musical instruments, to guarantee the expenses of a musical jubilee and festival, and that no action could be maintained against either corporation upon such a guaranty, though made with reasonable belief that the holding of such festival would be of great pecuniary advantage to such corporations by increasing their proper business, and though the festival had been held and expenses incurred in reliance upon the guaranty.

In Elevator Co. v. Memphis etc. R. R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52, the charter of the railroad gave it power "to do all lawful acts properly incident to a corporation, and to the transaction of the business for which it was incorporated, and also such additional powers as may be convenient for the due and successful execution of the powers granted in the charter." The railroad company guaranteed eight per cent dividends upon the stock of an elevator company which built a grain elevator upon the line of the railroad, but the court held the guaranty could not be enforced, saying: "In no part of the grant of power is that of guaranteeing the success of another institution, person or corporation, to be found, either in expression or implication."

In Pearce v. Madison etc. R. R. Co., 21 How. 441, 16 L. ed. 184, the supreme court of the United States held that two corporations created to construct distinct lines of railroad leading to Indianapolis had no right without authority from the legislature to consolidate into one corporation, and thereby to subject the capital of the one to answer for the liabilities of the other. The managers had also established a steamboat line to run in connection with these railroads, and the court held this to be "a departure from the business they were authorized to conduct, thereby diverting their capital from the [830] objects contemplated by their charters, and exposing it to perils for which they afforded no sanction."

In Coleman v. Eastern Counties Ry., 10 Beav. 1, where the railway company proposed to guarantee the profits of a steam packet company to run in connection with the railway, Lord Langdale, master of the rolls, restrained the company by injunction, saying: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than these, would be greatly to mistake the functions they perform and the powers which they exercise, which are given by act of parliament, and which extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned.

"But it had been contended that they have a right to pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the

shareholders. There is, however, no authority for anything of that kind."

And in East Anglian Ry. v. Eastern Counties Ry. Co., 11 Com. B. 775, where a similar guaranty was under consideration, it was held ultra vires, the court declaring the question to be one exclusively of power, and asking the unanswerable question, "What additional power do they acquire from the fact that the undertaking may in some way benefit their line? For whatever be their object or prospect of success, they are still but a corporation for the purpose of making and maintaining their railway."

These cases, which we have selected from the many that could be cited, sufficiently illustrate the principle which requires us to hold, as we do, that the agreement in this case is ultra vires.

But it is contended for the appellee that as the contract has been partly executed by both parties the railroad company is estopped to set up that defense.

331 Let us see how far this contention can be justified.

Judge Seymour D. Thompson in continuation of the passage from which we have quoted above, 10 Cyclopedia, 1146, says: "Such a contract will not be enforced by any species of action in a court of justice; being void ab initio, it cannot be made good by ratification, or by any succession of renewals, and no performance on either side can give validity to the unlawful contract, or form the foundation of any right of action upon it." It is true that the same distinguished author says, on page 1156 of Cyclopedia: "The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make the contract." This must be understood to mean, however, that the fruits or benefits of the contract must have been received from the other contracting party, and not from outside parties. That this is the true meaning of the passage appears from the language of the same writer on page 1155 of Cyclopedia, where he says, "If the contract of a corporation is ultra vires, but not immoral or otherwise malum in se, and either party disaffirms it on the ground that it is ultra vires, and refuses further execution of it, then, while the other party can-

not sue to recover damages or compensation in respect of the unexecuted portion of the contract, yet the law will afford him remedies for procuring from the other party a restoration of what he has lost under it. The governing principle is that where money has been paid or property transferred to a corporation, under a contract which is not malum in se, the party receiving may be made to refund to the party from whom it has received the value of that which it has actually received, and to this end he may maintain against the corporation the equitable common-law action for money had and received." In Johnson v. Hines, 61 Md. 122, where the question under consideration was what title passed to mortgagees under a mortgage from one whose title was derived from an unauthorized [332] conveyance by a trustee, Judge Yellott speaking for this court, said: "That nothing can emanate from nonentity, or, as more tersely enunciated, de nihilo, nil, is an axiom in the physical sciences which might be appropriately transferred to a judicial investigation of this nature." This is certainly sound logic, and a void contract can no more give rise to a right of action upon such contract, than a void deed can create title in the grantee.

In Thomas v. West Jersey R. R., 101 U. S. 71, 25 L. ed. 950, the railroad company made a twenty year lease of its road, which was acted under for five years and was then repudiated by the railroad, and the other party brought suit upon the contract. It was held void as ultra vires, but the doctrine of estoppel was invoked by the plaintiff on the ground that the contract had been partly performed. The court said: "It was the duty of the company to rescind or abandon the contract. Though they delayed this for several years, it was nevertheless a rightful act when done. Can this performance of a legal duty, a duty both to the stockholders and the public, give the plaintiff a right of action? To hold that this can be done, is in our opinion to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts."

In Central Transp. Co. v. Pullman Palace Co., 139 U. S. 24, 11 Sup. Ct. Rep. 478, 35 L. ed. 55, under a contract held ultra vires, the supreme court again held that part performance was no ground for enforcing further performance of an unlawful contract, though the Pullman company was required to account in an independent proceeding for the value of what it

had received from the plaintiff under the contract, saying: "In such case the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action, was not to affirm, but to disaffirm the unlawful contract." This is the doctrine of a majority of the state courts of highest repute.

[333] In Morville v. American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40, the court said: "The plaintiff's money was taken and is still held by defendant under an agreement which it is contended it had no power to make. The plaintiff is not seeking to enforce the contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of his own illegal act."

In Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628, in a suit upon a speculative contract which was held ultra vires, the defendant pleaded in estoppel on the ground of part performance, but the court, through Judge Cooley, said: "There are some decisions which give plausibility to the position of the defendant, but we know of none that is adequate to the exigencies of this case. The power on the part of such a corporation to enter into contracts of speculation, being withheld on reasons of public policy, for the protection of the shareholders and the general good of the community, the act neither of one party nor of both, in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the state for general, reasons has withheld from it: Pennsylvania Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 319, 29 Am. Dec. 543. Parties may be estopped in some cases from disputing the validity of a corporate contract when it has been fully performed on one side and when nothing short of enforcement will do justice. To quote the language of Comstock, C. J., in Parish v. Wheeler, 22 N. Y. 494, 'the executed dealings of corporations must be allowed to stand for and against both the parties when the plainest rules of good faith so require.' But this is not such a case. The contract has only been performed in part. No valid ground for estoppel is therefore found to exist in the case."

Our own decisions have distinctly recognized the principle of the cases we have cited above. In Maryland Hospital v. Foreman, 29 Md. 524, the hospital had received money from Foreman under a contract which the court said was not authorized [334] by the power conferred in its charter, and was therefore simply ultra vires, and not binding upon the parties," and Judge Bartol said: "The contract in all such cases will be regarded as void, and the party who delivered the property or advanced the money to the corporation will be entitled to his legal remedy, not founded upon, but in repudiation of the contract, to recover the property or the money from the corporation, upon the principle that it had acquired no right or title to either under the contract."

So in Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211. The appeal was from an order ratifying an auditor's account and allowing a claim for a debt due upon a loan made by the bank in violation of its charter, and the order was affirmed, the court saying that "in cases arising under contracts made in violation of a statute, it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it."

Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95, the bank sold bonds on commission in violation of its charter powers, but paid over the proceeds to the owners of the bonds, and it was held that not having any of the plaintiff's money obtained by means of the sale of the bonds, the defense of ultra vires was open to it.

In United German Bank v. Katz, 57 Md. 128, where the bank discounted a note in excess of its charter powers, a recovery was allowed upon the note, though the plea of ultra vires was made, but the principle upon which it is allowed was stated to be "that it is inequitable to permit one who has received the benefit of the contract to repudiate it on the ground that the corporation from which he received the benefit had no power to make the contract"; so that the form of recovery, and not the substantial right of recovery was the thing in question there. This is the only case in Maryland to which we have been referred in which a recovery directly upon the void contract has been allowed at law. The case of Heironimus v. Sweeney, 83 Md. 146, 55 Am. St. Rep. 333, 34 Atl. 823, 33 L. R. A. 99, like Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211, was an equity case, and where the defendant

has retained the [335] fruits of the void contract, the plaintiff may either resort to the common-law action for money had and received, or to an accounting in equity.

The case of United German Bank v. Katz, 57 Md. 128, was cited in Black v. Bank of Westminster, 96 Md. 399, 54 Atl. 88, but in the latter case the declaration contained the common counts as well as a special count on the note, and the recovery by the bank might be properly attributed to those counts, even if the note had been held to be purchased instead of discounted as it was held to be; and both those cases were cases of fully executed contracts in which the defendant sought to retain the fruits of the contract.

In this case, there is but one count in the declaration, and that is upon the void contract, and the proof is clear that the railroad company never received from the hotel company, either directly or indirectly, any money or property whatever under this contract. The only money it has received as a result of the contract is that paid by passengers for transportation over its own road, or for freight carried over the road. The hotel company has paid nothing, and parted with nothing under this contract, and is therefore under all the authorities without any right of action.

It follows from what we have said that the demurrer to the defendant's fourth plea should have been overruled, and the defendant's first and second prayers should have been granted, and for the error in sustaining the demurrer and refusing those prayers, the judgment must be reversed. As there can be no recovery under our view of this case, it is unnecessary to consider the other rejected prayers of the defendant.

Judgment reversed without a new trial. Costs above and below to be paid by the appellee.

The Doctrine of Ultra Vires, in its application to the contracts of private corporations, is discussed in the monographic note to In re Assignment of Mutual etc. Ins. Co., 70 Am. St. Rep. 156-180. The general rule is, that a person dealing with a corporation having limited and delegated powers is chargeable with notice of these powers and their limitations, and cannot plead ignorance of their existence: Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160. However, the plea of ultra vires is not favored, and when a corporation has received the benefits growing out of a contract, it will ordinarily be enforced against it: Wisconsin Lumber Co. v. Greene etc. Tel. Co., 127 Iowa, 350, 109 Am. St. Rep. 387; Minneapolis Fire etc. Ins. Co. v. Norman, 74 Ark. 190, 109 Am. St. Rep. 74.

The Authority of a Railroad Corporation to maintain a hotel or eating-house is considered in Abraham v. Oregon etc. R. R. Co., 37 Or. 495,

82 Am. St. Rep. 779; and the power of a railroad company to guarantee the payment of dividends to the subscribers of stock in an elevator company is considered in Elevator Co. v. Memphis etc. R. R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798. Becoming a surety or guarantor for the contract or debt of another is not ordinarily within the implied powers of a corporation: M. V. Monarch Co. v. Farmers' etc. Bank, 105 Ky. 430, 88 Am. St. Rep. 310; Wheeler v. Home Sav. etc. Bank, 188 Ill. 34, 80 Am. St. Rep. 161; Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26.

ROBERTS BROS. v. CONSUMERS' CAN COMPANY.

[102 Md. 362, 62 Atl. 585.]

ARBITRATION AND AWARD—Construction and Intendments in Favor of.—Where the parties to a dispute submit it to arbitration and have a full and fair hearing before the arbitrators, their award will be expounded favorably and every reasonable intendment made in its support. (p. 382.)

ARBITRATION AND AWARD—Finality of the Award.—Where the parties to an arbitration have had a full and fair hearing before arbitrators, the court will not look into the merits of the award and review the findings of law or fact made by the arbitrators, nor substitute its opinion or judgment for theirs, but will require the parties to submit to the judgment of the tribunal of their own choice, and to abide by its award. (p. 382.)

ARBITRATION AND AWARD—Setting Aside Award Because of Refusal to Receive Testimony.—Where the arbitrators refuse to open and consider a deposition taken by agreement of the parties and containing evidence material to their dispute, because such deposition was mailed by a notary to one of the parties instead of to the arbitrators, when such deposition, on its receipt, was promptly carried and delivered to one of the arbitrators, a court of equity will set the award aside. (p. 384.)

William A. Wheatley, for the appellants.

Joseph C. France, for the appellee.

363 SCHMUCKER, J. This is an appeal from a decree of the circuit court of Baltimore City which set aside an award rendered by arbitrators. The subject of the award was a dispute between the appellants and the appellee growing out of the sale of a quantity of tin cans intended for packers' use.

The entire dispute was submitted for decision to three arbitrators who heard evidence upon the subject and made an award in writing, which was subsequently, upon a bill filed for that purpose, set aside by the decree now appealed from. The merits of the controversy covered by the arbitration are not

364 before us on this appeal, and we express no opinion thereon pro or con, but it will be necessary for us to notice the nature and subject matter of that controversy in order to clearly discuss the issue presented by the record before us.

Both the appellants and the appellee are dealers in tin cans in Baltimore City. In the summer of the year 1903 the appellee purchased a large quantity of cans intended for shipment to its western customers. The cans were sold to the appellee f. o. b. at Baltimore, but, in the course of dealing between the parties, they were loaded by the appellants into the cars of the Baltimore and Ohio railroad company at Baltimore and consigned directly to the parties who had purchased them from the appellee, which supplied the names and residences of the consignees for that purpose. Sample cans were submitted for approval to the appellee, but the cans themselves which were consigned to the purchaser were never seen by the appellee. Whenever sales of the cans were made by the appellee they were loaded into the cars and the bills of lading therefor were taken out in its name, and it drew drafts against the bills for the price at which it had sold the cans, and the drafts with the bills of lading attached were placed in the hands of the appellants as collateral and for collection. As the appellee made a profit on the cans sold by it the proceeds of the drafts would slightly exceed the amount due on them to the appellants, who would account to the appellee for the excess.

In this course of dealing a car, said to be No. 91,106, loaded with cans was shipped by the appellants to the appellee's purchaser, the Westfield Packing Company, located in the state of Indiana, which paid the draft drawn against the bill of lading for the car in order to get possession of the cans. After that company had gotten possession of the cans it examined and rejected them as being unmerchantable and defective in quality; and to recover the damages which it had thereby sustained it sued out an attachment against the appellee in Indiana and levied the writ on several other carloads of the appellee's cans which had come within that jurisdiction. The 365 Westfield Company recovered a judgment in rem in the attachment suit for over twelve hundred dollars which the appellee had to pay in order to release the cars seized under the attachment.

Other carloads of the cans purchased from the appellants by the appellee, and sold by it to the Western Packing Com-

panies affiliated with the Westfield Company under a common management, were rejected by the purchasers and returned to Baltimore to the appellants who held the bills of lading therefor. When the appellants demanded payment for the cans from the appellee, it claimed the right to deduct from the price thereof the losses which it had sustained by reason of their alleged defective quality and unmerchantable condition. Litigation both at law and in equity between the appellants and the appellee resulted from this state of affairs, and the arbitration was resorted to for the adjustment of the differences between them.

The parties on April 28, 1904, entered into a written agreement briefly reciting their conflicting claims and submitting for determination to three arbitrators "the whole dispute between them, claim and counterclaim." The submission provided that "said arbitrators shall by reasonable notice from time to time give to said parties the opportunity of producing evidence before them; they shall determine all questions of law and fact; they shall make their final award in writing not later than the sixth day of June, 1904—unless said time is extended by the written assent of both parties; and such final award shall determine what amount of cash, if any, is due by either party to the other and what, if anything, either party shall do as a condition of being entitled to payment of the amount awarded. The evidence of any witness not residing in the state of Maryland may be taken before a notary public by either party upon five days' notice to the other of the time and place. The evidence as taken shall be returned to the arbitrators under the hand and seal of the notary." It was further provided in the submission that the award of a majority of the arbitrators, in case [366] of a failure of the entire number to agree should be binding on both parties.

The arbitrators held a number of sessions between May 5th and 17th, and heard testimony oral and documentary produced before them by the parties to the submission, and on the nineteenth day of May they rendered their unanimous award in writing finding that the appellee was indebted to the appellants in the sum of five thousand one hundred and one dollars and ninety-nine cents, that upon the payment thereof they execute and deliver to it a release of all demands of every kind to date.

On the 27th of May the appellee filed the bill in the present case alleging the dealings in tin cans between it and the defendants, the dispute arising therefrom, the arbitration and the award, all of which we have briefly mentioned. It also alleged the following facts: On May 6th, while the arbitration was in progress, it was agreed between the parties and the arbitrators that the appellee should have until May 17th, to take and return the depositions of witnesses from Noblesville, Indiana, touching the condition of the cans in car No. 91,106, upon which depended the substantial question at issue before the arbitrators whether the said cans were of such quality and in such condition as to constitute a good delivery under the contracts between the parties. The depositions were taken before a notary at Noblesville on May 13th, after notice to the appellants and certified under the hand and seal of the notary as having been taken in the arbitration, but through mistake and contrary to the directions of the appellee's attorney they were mailed by the notary in a box to the address of the appellee instead of that of the arbitrators. The box containing the depositions was delivered on Sunday, May 15th, at the office of the appellee, which was on that day in charge of a watchman who handed the bag unopened to the president of the appellee on his arrival at the office at about 8 o'clock on Monday morning. He promptly took it to the office of one of the arbitrators and left it with him still unopened. On May 17th, the day fixed for the final session of the arbitrators the package containing the depositions was [367] produced by the one of the arbitrators having it in his possession, but by a vote of two to one the arbitrators decided not to open the package or consider the depositions, upon the ground that it was addressed to the appellee instead of the arbitrators. Thereupon the appellee's counsel urged the arbitrators to open the package and satisfy themselves that its contents had not been disturbed, or at least to permit the depositions to be returned to Noblesville and recertified and redirected, but the arbitrators, although they had until June 6th, to return their award, refused to adopt either suggestion and made their award without inspecting or considering the depositions, which constituted the only evidence of the appellee upon the vital point of the question in dispute. Upon the refusal of the arbitrators to examine or consider the depositions the appellee filed with them a written protest against their conduct in that respect.

The bill further charged that the award was invalid for the reason that it did not dispose of the entire controversy submitted, in that it failed to require the appellants, upon the payment of the sum awarded to them, to return to the appellee sundry collaterals which the evidence showed were held by them as security for any balance which might be due them from the appellee on account of the sales of tin cans under consideration by the arbitrators.

The answer denies many of the allegations of the bill and charges the appellee with a purpose to procrastinate and evade the payment of its obligations, but it admits the extensive transactions in cans between the parties, the shipment of them as directed by the appellee, the occurrence of disputes over the transactions, and their submission to arbitration and the award of the arbitrators. It also admits the agreements for taking depositions at Noblesville and their rejection by the arbitrators, but avers that the rejection was proper because they were not taken and returned in accordance with the arbitration agreement. It further charges that the failure to have the depositions properly returned was part of a studied plan for further delay concocted and persisted in by the appellee. [388] The answer insists that the award does fully cover all points submitted to the arbitrators and it makes allegations explanatory of the dealing of the appellants and arbitrators with the collaterals referred to in the bill, and insists that the appellee is indebted to the appellants after the allowance of all credits to which it is justly entitled, in the full sum found by the award.

Much testimony was taken in the present case, the greater portion of which related to the merits of the original controversy between the parties over the transactions with the tin cans. The remaining portion of the testimony had reference to the transmission to Baltimore of the box containing the depositions taken at Noblesville, Indiana, and its receipt and rejection by the arbitrators. That testimony convinces us that the box was mailed, by the notary before whom the depositions had been taken, to the appellee instead of to the arbitrators, purely through the mistake of the notary, without the suggestion or procurance of the appellee. We are also convinced by the testimony that the box, upon its receipt by the appellee, was promptly delivered to the arbitrators by the president of the appellee without having been opened or tampered with. The cardinal question therefore now before us

for decision is, whether the rejection by the arbitrators of the depositions under these circumstances constituted such a mistake on their part as to justify the circuit court in setting aside the award by the decree appealed from.

It has been settled by a long line of decisions that, as arbitrations are intended to compose disputes in a simple and inexpensive manner, whenever the parties to one have had a full and fair hearing the award of the arbitrators, will be expounded favorably and every reasonable intendment made in its support: Lewis v. Burgess, 5 Gill, 129; Caton v. McTavish, 10 Gill & J. 192; Ebert v. Ebert, 5 Md. 353; Garitee v. Carter, 16 Md. 300; Bullock v. Bergman, 46 Md. 270; Witz v. Tregallis, 82 Md. 351, 33 Atl. 718. In such cases it is conceded that the court will not look into the merits of the matter and review the findings of law or fact made by the arbitrators nor substitute [369] its opinion or judgment for theirs, but will require the parties to submit to the judgment of the tribunal of their own selection and abide by the award.

The favor which the courts accord to awards of arbitrators is, however, predicated upon the assumption that in the conduct of the arbitration the parties to the controversy had a full and fair hearing, and that the award is the honest decision of the arbitrators and involves no mistake so gross as to work manifest injustice or furnish evidence of misconduct on their part: 3 Cyc. 743; Roloson v. Carson, 8 Md. 208; Wilson v. Boor, 40 Md. 483; Burchell v. Marsh, 17 How. 344, 15 L. ed. 96.

It is not denied in the present case that the arbitrators refused to receive or consider the depositions on behalf of the appellee taken in Indiana in reference to the condition of the cans in car No. 91,106. The award must, therefore, have been made without reference to that testimony. The bill of complaint alleges most positively that the substantial question between the parties to the arbitration was whether the cans in that car were in fact unmerchantable, as that fact, if true, formed the basis of the appellee's claim, and that the rejected depositions constituted its only evidence on that subject. It is apparent from the nature of the controversy submitted to the arbitrators, that this evidence was vital to the appellee's side of that controversy.

The avowed reason of the arbitrators for rejecting it was that the box containing it was mailed by the notary to the appellee instead of to the arbitrators. In view of the fact that

the appellee's president, upon the receipt of the box containing the depositions, promptly carried it unopened to one of the arbitrators and left it with him, we are of the opinion that the arbitrators should have received the depositions and considered them in arriving at their decision of the case submitted to them. In courts of law, where the right to issue commissions to take testimony rests entirely upon statute, it is held to be in derogation of the common law and a strict compliance with the requirements of the statute as to the execution and return of the commission is usually required: 2 Elliott on [370] Evidence, sec. 1130; Poe on Practice, sec. 223A; Williams v. Bank, 5 Md. 198; Quynn v. Carroll, 22 Md. 288. It has therefore been held by those courts that where the statute required the return of the commission to be made to the clerk of the court or to the court from which it issued a return to one of the litigants would be bad.

Arbitrations are, however, not governed by the strict rules as to the admissibility of evidence in force in courts of law. An attempt to require the application of those rules by lay arbitrators who cannot be expected to know them would often result in defeating the very purpose of the arbitration. Moreover in the present case no formal commission to take testimony was contemplated or provided for by the submission. The simple plan of taking depositions before a notary was resorted to. The depositions were by the terms of the submission to be returned to the arbitrators by a certain day, and that was substantially done, as it appears that the package containing the depositions reached their hands unopened within the prescribed time. It has been held in a number of cases that a return of depositions to the clerk of a court having no rule to the contrary through one of parties to the case is sufficient if the depositions are in the condition in which they left the hands of the official before whom they were taken, and due proof of that fact is made: Logan v. Hodges' Admr., 7 Ala. 66; Veach v. Bailiff, 5 Harr. (Del.) 379; Homer v. Martin, 6 Cow. 156; Doty v. Strong, 1 Pinn. 313, 40 Am. Dec. 773; 13 Cyc. 962.

The submission, unlike our statute and rules of court, prescribed no particular channel of transmission to the arbitrators of the depositions when taken, and as it appears from the record that they were in fact taken before a notary public after five days' notice, and returned under the hand and seal of the notary and reached the arbitrators in an unaltered con-

dition within the prescribed time, there was a sufficient compliance with the terms of the submission to serve the substantial ends of justice and the arbitrators should have received and considered them.

The appellee did not waive its right to assail the award by [371] not withdrawing its submission when the arbitrators refused to receive or consider the depositions on its behalf. Waiver is a matter of intention, and the positive and timely protest against their action in that respect made plain its intention not to waive its rights in the premises: Morse on Arbitration and Award, p. 173; Haigh v. Haigh, 31 L. J. Ch. 420; Davis v. Price, 10 Week. Rep. 865.

As the decree of the court below setting aside the award must be affirmed for the reasons already stated, we deem it unnecessary to consider the further objection that it failed to cover the entire ground of the submission.

The decree appealed from will be affirmed.

Decree affirmed with costs.

A Submission to Arbitration is an agreement by which the parties refer disputed or doubtful matters pending between them to the final decision and award of another person: Millsaps v. Estes, 137 N. C. 535, 107 Am. St. Rep. 496. Arbitrators are expected to frame their decisions on broad views of justice, which may sometimes deviate from strict rules of law: Brush v. Fisher, 70 Mich. 469, 14 Am. St. Rep. 510. They are to decide according to their own opinion of equity and conscience, and are not bound to observe any precedents or positive rules of law: Jocelyn v. Donnel, 1 Peck, 274, 14 Am. Dec. 753. As to what misconduct on the part of arbitrators will justify setting aside their award, see Hewitt v. Reed City, 124 Mich. 6, 82 Am. St. Rep. 309; Christianson v. Norwich Union Fire Ins. Co., 84 Minn. 526, 87 Am. St. Rep. 379, and cases cited in the cross-reference note thereto.

GARITEE v. BOND.

[102 Md. 379, 62 Atl. 631.]

CRIMINAL LAW—Infamous Crime.—The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery, and those other offenses classified as crimen falsi, which impressed upon their perpetrator such a moral taint that, to permit him to testify in legal proceedings, would injuriously affect the administration of justice. (p. 388.)

CRIMINAL LAW—Infamous Crime, What is not.—The crime on the part of an attorney engaged in prosecuting a claim for pension of collecting and retaining a greater fee than ten dollars, though punishable at the discretion of the court by a term of imprisonment, which the court might, in the exercise of its power, have required him to serve in the penitentiary, does not involve that degree of moral turpitude required to make it an infamous crime at the common law. (p. 389.)

CRIMINAL LAW—Infamous Crime—State Court not Bound by the Views of the National Courts on the Subject.—Though the crime of receiving and retaining more than ten dollars for services in procuring a pension may be regarded in the federal court in which the trial and conviction therefor took place as an infamous crime the state court is not bound by the views of the national court on that subject. (p. 389.)

EXECUTORS—Disqualification Because of Infamous Crime.—Under a statute providing that if the person named as executor in a will has been guilty of a crime rendering him infamous according to law, administration may be granted as if he had not been named, a person is not disqualified because he collected and retained more than ten dollars for his services in procuring a pension. (p. 390.)

Thomas C. Ruddell and Joseph W. Bristor, for the appellant.

W. Ashbie Hawkins and George W. F. McMechen, for the appellee.

380 SCHMUCKER, J. The appellant was named as executor in the last will of Sophia V. Chambers, late of Baltimore City. Upon his application to the orphans' court of that city for letters testamentary upon her estate, the appellee, claiming to be the adopted son of the testatrix, filed a petition asking that the letters be refused because appellant had been convicted of, and imprisoned for, an infamous crime and had been disbarred as an attorney by the supreme bench of Baltimore City for unprofessional conduct involving moral turpitude.

381 The appellee answered the petition denying that he had been convicted of any infamous offense, or that he was not a

fit and proper person to act as executor, and insisting that the matters alleged in the petition would not justify the court in refusing to grant him letters testamentary. The record contains no evidence touching the appellant's alleged disbarment by the supreme bench, nor is that allegation adverted to or noticed in the order appealed from, but there does appear in the record a transcript of proceedings from the district court of the United States for the district of Maryland showing his indictment and conviction for a violation of the act of Congress approved June 27, 1890, chapter 634, section 4. That act provides as follows: "No agent, attorney or other person engaged in preparing, presenting or prosecuting any claim under the provisions of this act, shall directly or indirectly, contract for, demand, receive or retain for such services in preparing, presenting or prosecuting such claim, a sum greater than ten dollars, which sum shall be payable only upon the order of the commissioner of pensions by the pension agent making payment of the pension allowed; and any person who shall violate any of the provisions of this section or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed or due such person or claimant under this act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall for each and every offense be fined not exceeding five hundred dollars or be imprisoned at hard labor not exceeding two years or both in the discretion of the court."

The indictment in the district court charges the appellant with having, in violation of the statute, unlawfully demanded and received from a pensioner for prosecuting his claim for the pension the sum of twelve dollars, which was not paid to him upon the order of the commissioner of pensions by the pension agent making payment of the pension. It does not appear from the proceedings whether the traverser charged the pensioner twelve dollars in addition to the ten dollar fee contemplated by the law, but it does appear that the twelve [382] dollars were collected from the pensioner in violation of the statute.

The orphans' court, upon a hearing of the matter thus presented to it, passed the order appealed from on July 12, 1905, declaring that the appellant "be and he is hereby removed as executor of the will of Sophia V. Chambers, he having been convicted of an infamous crime and that letters testamentary to him be refused." It is conceded that the orphans'

court in passing this order acted in exercise of power supposed to have been conferred upon it by section 51, of article 93, of the Code of Public General Laws, which provides as follows: "If any person named as executor in a will shall be at the time when administration ought to be granted under the age of eighteen years or of unsound mind, incapable according to law of making a contract or convicted of any crime rendering him infamous according to law, or if any person named as executor shall not be a citizen of the United States, letters testamentary or of administration may be granted in the same manner as if such person had not been named in the will."

Without pausing to consider the propriety of the form of the order appealed from we pass to the discussion of the most important question presented by the record which is whether the offense of which the appellant was convicted in the federal court was an infamous one within the meaning of section 51 of article 93 of the code.

The authorities differ in their definition of an infamous crime. Some of them rely for that purpose upon the character of the crime with reference to its degree of moral turpitude while others hold that the true test is the nature of the punishment inflicted for the commission of the offense. The definition has in some instances been made to depend largely upon the connection in which the designation infamous was applied to the offense and the purpose intended to be accomplished by its use. Thus, in construing the provision of the federal constitution which prohibits prosecution for "a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," the supreme court of the United
383 States in the habeas corpus case of Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935, 29 L. ed. 89, held that the provision must be considered not merely from the standpoint of the character of the crime but also from the nature of the consequences to the accused if he should be found guilty, and it discharged the prisoner, whose offense was punishable by imprisonment for a term of years at hard labor, because he had been tried and convicted upon a mere information without indictment or presentment by a grand jury. The court in that case gave to the constitutional provision then under consideration, which was manifestly adopted for the benefit of accused persons, that construction which afforded to the greatest number of such persons the benefit of its operation. That decision was followed by a number of others in the same court

holding that imprisonment in the penitentiary was infamous punishment: Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. Rep. 777, 29 L. ed. 909; In re Mills, 135 U. S. 263, 10 Sup. Ct. Rep. 762, 34 L. ed. 107; In re Claasen, 140 U. S. 200.

But even in Wilson's case it was held that at common law prior to the Declaration of Independence, "it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime and not upon the nature of his punishment."

The authorities generally, though not with entire uniformity, hold that the infamous nature of a crime was determined at common law by the character of the act itself and not by the penalty inflicted for its commission. The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery, and those other offenses, classified generally as crimen falsi, which impressed upon their perpetrator such a moral taint that to permit him to testify in legal proceedings would injuriously affect the public administration of justice: Rex v. Ford, 2 Salk. 690; Bouvier's Law Dictionary, 1027; 1 Greenleaf on Evidence, sec. 373; Wharton's Criminal Law, sec. 758; Bishop's Criminal Law, sec. 974; Utley v. Merrick, 52 Mass. 302, 12 Cyc. 135; 16 Am. & Eng. Ency. of Law, p. 247, and cases there cited; Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764; State v. Nolan, 15 R. I. 529, 10 Atl. 481. Our predecessors had occasion [384] in this case of State v. Bixler, 62 Md. 354, to determine what constituted an infamous crime within the meaning of section 2 of article 1 of the constitution of this state which prohibits from voting at any election a person "convicted of larceny or other infamous crime unless pardoned by the governor." It is said in the opinion in that case, "An 'infamous crime' is such a crime as involved moral turpitude, or such as rendered the offender incompetent as a witness in court, upon the theory that a person would not commit so heinous a crime unless he was so depraved as to be unworthy of credit: 1 Abbott's Law Dictionary, 602, and authorities there cited. The general court of this state in Evans v. Bonner, 2 Har. & McH. 377, defined infamous crime to be one which rises at least 'to the grade of felony.' This is, however, too narrow, for perjury is a misdemeanor, but by all authority is 'infamous.' The constitution in providing for exclusion from suffrage of persons whose character was too bad to be permitted to vote could only have intended by the

language used such crimes as were infamous at common law, and are described as such in common-law authorities. There are many misdemeanors punishable by confinement in the penitentiary which are clearly not infamous crimes within the meaning of the common law or of the constitution. If for example the prisoner had been convicted of any of the assaults with intent mentioned and punished by the code, and had been sentenced to the penitentiary and served his time out there, without being pardoned by the governor, he would not be chargeable with having committed an 'infamous crime.' "

Construing therefore as we should the expression "infamous crime," used in section 51 of article 93 of the code, in the same manner that our predecessors construed it when used in the constitution, we are compelled to hold that the statutory offense of which the appellant was convicted cannot be regarded by us an infamous one merely because it was punishable at the discretion of the court by a term of imprisonment which that court might, in the exercise of its recognized power, have required him to serve in a penitentiary. Nor do we [385] think that the statutory offense, of which the appellant was convicted, of making an overcharge for services in prosecuting a claim for a pension, and collecting the fee so charged without complying with the provisions of the statute, involved the degree of moral turpttude which would have been requisite to make his transgression an infamous crime at common law.

Even if we assume that in the contemplation of the federal jurisdiction in which the appellant was tried and convicted his offense would be regarded from the nature of its punishment as an infamous one, that jurisdiction must be considered quoad hoc as foreign to that of the Maryland courts: Logan v. United States, 144 U. S. 263, 12 Sup. Ct. Rep. 617, 36 L. ed. 429; Langdon v. Evans, 3 Mackey (D. C.), 1. In Logan's case, the supreme court held that both "at common law and on general principles of jurisprudence when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect by way of disqualification of a witness beyond the limits of the state in which the judgment is rendered": See to same effect, Commonwealth v. Green, 17 Mass. 515; National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632; Story on Conflict of Law, sec. 92.

The orphans' court was therefore in error in treating the appellant as disqualified to fill the office of executor because he had been convicted and sentenced by the district court of the United States for the offense mentioned in the record, and for that error the order appealed from must be reversed, and the case remanded for further proceedings in accordance with this opinion.

Order reversed with costs, and cause remanded for further proceedings.

An Infamous Crime is generally defined as one punishable with imprisonment in a state prison: Gudger v. Penland, 108 N. C. 593, 23 Am. St. Rep. 73. However, it is not the severity of the punishment, but rather the nature of the offense, which determines whether or not a crime is infamous: Smith v. State, 129 Ala. 89, 87 Am. St. Rep. 47; State v. Keys, 8 Vt. 57, 30 Am. Dec. 450; note to Lodge v. State, 82 Am. St. Rep. 35.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

TEAGAN TRANSPORTATION COMPANY v. BOARD OF ASSESSORS OF DETROIT.

[139 Mich. 1, 102 N. W. 273.]

TAXATION OF CORPORATION—Situs of Property.—Under a statute which declares that the property of a corporation is taxable "where its office is located in its articles of incorporation," provided its business is actually transacted in such office, but that if it establishes its principal office at any other place than the one named in the articles, then the place where it transacts its principal business is to be deemed its residence for purposes of taxation, the residence of a corporation for the purpose of taxation is at the place where its principal business, such as receiving and paying out its funds, is conducted, and not at the place named as its office in its articles of incorporation, when the only business there transacted is the annual meeting of the stockholders. (p. 394.)

TAXATION OF CORPORATION—Situs of Property—Uniformity.—A statute which provides that the personal property of all corporations engaging in maritime commerce or navigation shall be assessed only in the city, village or township which is stated in their articles of incorporataion to be the location of their general office for business, confers on such corporations the special privilege of determining the situs of their property for purposes of taxation, and violates the constitutional provision requiring a uniform rule of taxation. (p. 397.)

TAXATION—Situs of Property—Rule of Uniformity.—The legislature, in determining the situs of personal property for purposes of taxation, must regard the constitutional requirement of uniformity. (p. 400.)

Graves & Hatch and Angell, Boynton, McMillan & Bodman, for the relators.

Timothy E. Tarsney, for the respondent.

[2] CARPENTER, J. Writs of certiorari bring before us for review three mandamus proceedings determined in the cir-

cuit court for the county of Wayne. Each of the above-named relators is a corporation engaged in transporting goods by water, and each asks for a mandamus (which the lower court refused to grant) compelling respondent to strike from the assessment-rolls an assessment on account of certain steamboats owned by it. Said steamboats during the season are engaged in navigating the Great Lakes, and are seldom in the city of Detroit. In the articles of incorporation of the first two relators the township of Hamtramck, Wayne county, is named as the location of their general offices for business. In the articles of incorporation of the last-named relator, viz., the Wolverine Steamship Company, the village of Utica, Macomb county, is named as the location of its general office for business. At the place named as the location of their offices relators never had any regular business office. All they did there was to use the office or house of another for their annual stockholders' meeting, and in case of the Teagan Transportation Company also for the first meeting of the directors elected at said stockholders' meeting. Substantially all the other business of said Teagan Transportation Company which was not done on its boats was done in the city of Detroit. The management of the ordinary business of the last two named relators was carried on by their agent at Cleveland. Their funds, [3] however, except those required "to pay the ordinary running expenses of the boats and the officers and crew," were received and disbursed by their treasurer at Detroit; and it may be inferred that this official at Detroit decided any business matters "outside the ordinary course" not necessary—that is, as we infer, which he may decide to be not necessary—to submit to the board of directors.

The question of whether relators' property is taxable in the city of Detroit depends upon the constitutional validity and construction of section 3834 of 1 Compiled Laws. That section reads: "All corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation. The place where its office is located in its articles of incorporation shall be deemed its residence; provided, its business is actually transacted at such office; but if it shall establish its principal office in any other place than the place named in its articles of incorporation, then the place where it transacts its principal business shall be deemed its residence for all

the purposes of this act. If there be no principal office in this state, then at the place in this state where such corporation or agent transacts business; provided, further, that all the personal property of all corporations heretofore or hereafter organized under the laws of this state for the purpose of engaging in maritime commerce or navigation shall be assessed only in the city, village, or township, which is stated in their original articles of association or in any amendment thereof heretofore or hereafter made to be the location of their general office for business."

This section was section 11 of the general tax law passed in 1893: See Pub. Acts 1893, Act No. 206. As originally enacted, the section contained no special provision for the taxation of property of corporations engaged in navigation. The proviso relating to the taxation of such property (the last proviso above quoted) was put into the section by amendment in 1895: See Pub. Acts 1895, Act No. 229. It is obvious that, if this proviso is constitutional, relators' property was not taxable in Detroit, but was taxable [4] at the place named for the location of its general office for business. The contention of respondent's counsel that this property is taxable in Detroit compels them to affirm these two propositions: 1. That the proviso is unconstitutional; 2. That the statute, with the proviso eliminated, properly construed, makes relators' property taxable in the city of Detroit. We will consider each of these questions, but, as we should not determine a statute to be unconstitutional until it is shown that such determination is necessary to a disposition of the case, we will consider them in inverse order.

2. If we eliminate the proviso, the constitutionality of which is in question, the statute made the property taxable "where its office is located in its articles of incorporation; provided, its business is actually transacted at such office; but if it shall establish its principal office in any other place than the place named in its articles of incorporation, then the place where it transacts its principal business shall be deemed its residence for all the purposes of this act. If there be no principal office in this state, then at the place in this state where such corporation or agent transacts business."

The court below, by a majority opinion, denied the mandamus. It must be assumed that the court found as a fact that relator's business was not actually transacted at the office named in their articles of incorporation, and was trans-

acted at the city of Detroit. We cannot review this finding of fact if there was evidence to support it. We can only inquire whether there was such evidence. It appears that all that was done at the office named in the articles of incorporation was to hold the annual meeting of stockholders, and in the case of the Teagan Transportation Company also the first annual meeting of directors elected by the stockholders. Unless we decide that the holding of annual meetings of stockholders and directors is the principal business of said corporations, we must hold that that principal business was not transacted at the place named in the articles of incorporation. It is true that we [5] held in City of Detroit v. Lothrop Estate Co., 136 Mich. 265, 99 N. W. 9, that the principal business was done at the office where the manager resided, and where the manager and shareholders "meet to do whatever is necessary for them to do." This by no means decides that the annual meeting of stockholders constitutes the principal business of the corporation. To so hold would, in my judgment, clearly frustrate the legislative purpose. It is said that the personal property of the corporation should be taxable at the place "where its office is located in its articles of incorporation: provided, its business is actually transacted at such office." By "business" the legislature meant something more than the annual meeting of stockholders and newly chosen directors. If it did not, other and more appropriate language would surely have been used. We come, then, to the question, Had the lower court the right to infer that the relator corporations did such business in the city of Detroit as to make their personal property taxable there? We have shown that substantially all the business of relator the Teagan Transportation Company was done in Detroit; that the treasurer of the other relators resided in Detroit, had (and, it may be inferred, there exercised) superior powers of business management, and that he there received and disbursed the funds of said corporation except those disbursed for the ordinary running expenses of their boats. If the holding of annual meetings of stockholders and directors did not constitute the principal business of the corporations (and we have stated that in our judgment it did not), it follows that the personal property of the corporation was taxable either at the place where it established an "office for the transaction of its principal business, or, if it had no principal office, then at the place in this state where such corporation transacts business."

It is immaterial whether we say that the place where the corporation did its business in Detroit was "its principal office for the transaction of business," or whether we say that it had no principal office in that city. The fact that it transacted [6] business of the character already stated—business which was obviously more than clerical—made that the place where its personal property was taxable under the hypothesis that the proviso of 1895 was unconstitutional. We come to the consideration of the question:

1. Is the provision that "the personal property of all corporations heretofore or hereafter organized under the laws of this state for the purpose of engaging in maritime commerce or navigation shall be assessed only in the city, village, or township which is stated in their original articles of association or in any amendment thereof heretofore or hereafter made," constitutional? It will be noticed that this provision is not confined to "vessel property," so called, but extends to all the personal property of corporations "engaged in maritime commerce or navigation." While the personal property of individuals is taxable at their place of residence, and while the property of other corporations is taxable at the place of their principal business office, corporations engaging in maritime commerce or navigation may have their property taxed at whatever place they may chose to designate in their articles of incorporation. As the rate of taxation varies much in different localities, it gives to the latter corporations the right to select that place in which the rate of taxation is lowest. It thus gives to them the privilege of paying less taxes than must be paid by other corporations or by individuals engaged in precisely the same business. Neither can it be said that individuals have the same right to select the place in which their property will be taxed because it will be taxed at the place in which they may chose to reside. It is true that individuals may determine where they will reside, and corporations in general may determine where they will do business, but, in order to make their property taxable at that place, the individuals must actually reside there (see Beecher v. Common Council of Detroit, 114 Mich. 228, 72 N. W. 206), and the corporations must actually do business there (see Detroit Transp. Co. v. Board of Assessors of Detroit, 91 Mich. [7] 382, 51 N. W. 978). Neither such corporations nor individuals have the same right to determine the situs for the taxation of their personalty as this statute undertakes to

give to corporations engaged in maritime commerce and navigation.

The question arises whether such a law does not violate the provision contained in section 11, article 14 of our constitution, requiring a uniform rule of taxation. In Western Transp. Co. v. Scheu, 19 N. Y. 408, and Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (cases relied on by relators), laws like that under consideration were enforced; but those cases throw no light on the constitutional question before us. There no constitutional question was raised—perhaps none could be raised—and no such question was considered by the court.

In Cooley on Taxation, after demonstrating the proposition that perfect uniformity and perfect equality in taxation is unattainable, it is said: "But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made—whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for, if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment": 1 Cooley on Taxation, 3d ed., p. 260.

In the note to this text is the following quotation from the opinion of the court in Atchison etc. R. R. Co. v. Clark, 60 Kan. 826, 58 Pac. 477, 47 L. R. A. 77: "Absolute equality in taxation is, of course, unattainable; but a law the manifest purpose and legitimate result of which is discrimination and inequality cannot be sustained."

In Standard Life etc. Ins. Co. v. Board of Assessors of Detroit, 95 Mich. 466, 55 N. W. 112, this court held that [8] a law which subjected banks and insurance companies to a higher rate of taxation than that of other individuals and corporations was unconstitutional.

In Pingree v. Auditor General, 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679, and Detroit Citizens' St. Ry. v. Common Council of Detroit, 125 Mich. 694, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809, similar decisions were made.

It follows from these decisions that, if the legislature had attempted to impose an onerous burden of taxation upon the property of corporations engaged in maritime commerce and navigation, such legislation would be void. But the act in question, instead of imposing an onerous burden upon such corporations, confers upon them a special privilege.

The question arises—and this is a question not argued by counsel, but which must necessarily be determined before we adjudge the law unconstitutional—whether the act can be sustained as a partial exemption from taxation. It cannot be supposed that the legislature enacted this law upon the ground that the property of corporations engaged in maritime commerce and navigation should be exempt. So far as that property consists of vessels engaged in commerce, it in no respect differs from vessels belonging to individuals engaged in commerce. So far as it consists of other tangible or intangible personal property, it in no manner differs from such property belonging to other individuals and corporations. This law cannot be sustained as a law partially exempting property from taxation unless the legislature has power to single out individuals or corporations from the class to which they belong, and capriciously exempt them from taxation. We are forced to say that the legislature has not that power.

In 1 Cooley on Taxation, third edition, pages 381, 382, it is stated: "It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious [9] legislative favor. Such favoritism could make no pretense to equality. It would lack the semblance of legitimate tax legislation": See Hamilton v. Wilson, 61 Kan. 511, 59 Pac. 1069, 48 L. R. A. 238; City of Lexington v. McQuillan's Heirs, 9 Dana (Ky.), 513, 35 Am. Dec. 159. We are bound, therefore, to declare that the constitutional provision requiring uniformity of taxation prevents the legislature enacting a law which it must be presumed was intended to and does tax property at a rate different from that imposed on all property of precisely the same class. Tested by this principle, the law (the proviso) under consideration is unconstitutional, for, as we have already shown, it clearly taxes (and we must assume that the legislature intended that it should tax) the property of corporations engaged in maritime com-

merce and navigation at a rate different from all other property of the same class. But it is said that this result is brought about in an unusual manner, viz., by selecting the situs for taxation. And it is earnestly contended that the constitutional requirement of uniformity does not affect the legislative power to determine that situs. If this argument is sound, it leads to some peculiar consequences. In the case before us it permits a particular class of corporations to have their property assessed for taxation at that place in the state where taxation is lowest. If relators' argument is sound, it would be competent for the legislature to declare that such property should be taxed at that municipality in the state whose rate of taxation was highest. If such a law were passed, would it not be clear that relators could successfully maintain that their property was taxed at a rate higher than that imposed on other property of the same class?

In support of their argument that the requirement for uniformity does not affect the power of the legislature to determine the situs for taxation, relators cite State v. Runyon, 41 N. J. L. 98; Crawford v. Linn County, 11 Or. 482, 5 Pac. 738; City of Winston v. City of Salem, 131 N. C. 404, 42 S. E. 889. What is decided in State v. Runyon, 41 N. J. L. 98, is [10] sufficiently shown by the following quotation from that opinion: "The framers of the constitutional amendments did not aim at the impossible. They contented themselves with the accomplishment of so much of good as was attainable under the single requirement that 'property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.' In other respects the legislative power over taxation was left unimpaired. If property be such in its nature as, upon ordinary principles of taxation, to be capable of having a twofold situs for taxation, the legislature may select either as the place where the tax shall be laid."

Conclusive proof is furnished that the court did not intend by this statement to assert the proposition contended for by relators by other language in the opinion, which I quote: "The object of this constitutional provision was the equalization of taxation in its relation to the several parts of the state, and the prevention of unjust discriminations in the apportionment of the public burdens among its citizens liable to taxation."

In Crawford v. Linn County, 11 Or. 482, 5 Pac. 738, it was held that the constitutional provision requiring uniformity

was not violated by a law which taxed mortgages covering land in two or more counties at the place where the mortgagee resides, and which taxed other mortgages where the mortgaged land was situated. This decision proceeded upon the ground that the court could not say that this determination of situs was favorable or burdensome to either of these two classes of mortgagees. And it was said: "If the court could know judicially that the one or the other were hurt, it would be sufficient." It is true that it is said in this opinion: "A limitation on the power of the legislature to fix rates of assessment and taxation has nothing to do with the power of the legislature to fix the situs of personal property for the purposes of taxation." If by this the court intended to assert the proposition contended for by relators, it has no more than stated a dictum.

[11] In City of Winston v. City of Salem, 131 N. C. 404, 42 S. E. 889, it was decided that a law which made personal property generally taxable at one's place of residence and the personal property of partnerships and corporations taxable at their places of business was constitutional. It may be said in this case, as was said in the case of Crawford v. Linn County, 11 Or. 482, 5 Pac. 738, that the court could not judicially know that this method of taxation discriminated in favor of or against either of these classes of taxpayers. In saying in its opinion that the constitutional provision requiring uniformity left the legislature "free, as always heretofore, to prescribe regulations as to the situs of personal property," the court went far beyond the requirements of the case, and, like the Oregon case, has merely stated a dictum.

We are bound to say from this examination of authorities that there is nothing but dicta to sustain relators' contention. We are therefore free to determine on principle whether the constitutional requirement of uniformity affects the legislative authority to determine the situs for the taxation of personal property. This is not a difficult inquiry, especially if the proposition be stated in different, but in equivalent, language, viz., can the legislature, in determining the situs for the taxation of personal property disregard the constitutional provision requiring uniformity? The legislature derives its authority to determine the situs for the taxation of personal property—and it certainly has that authority (see Common Council of Detroit v. Board of Assessors of Detroit, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59)—not from any

express constitutional grant, but from the grant of general authority to legislate. The provision requiring uniformity of taxation is a constitutional limitation on that authority. To contend that in determining such situs the legislature may ignore the constitutional requirement of uniformity is to contend that in exercising its general authority the legislature may ignore the constitutional limitation on that authority. This argument nullifies all constitutional limitations on legislative authority, and is therefore unsound. We are [12] therefore forced to conclude that the legislature in determining the situs for the taxation of personal property, must regard the constitutional requirement of uniformity, and the disregard of that requirement makes the law under consideration unconstitutional and void. We do not, by our decision, negative relators' claim that it is unjust that their property (which, like much other property similarly located, receives no benefit from the expenditures of municipal tax in Detroit) should contribute toward their payment. Neither do we declare that it is beyond the power of the legislature to enact a law which will remedy this injustice. What we do say is that any such law—unlike that before us—must regard the constitutional requirement of uniformity.

It follows that the lower court was right in refusing a mandamus, and their decision is affirmed, with costs.

Moore, C. J., and Grant, Montgomery, and Hooker, JJ., concurred.

The Situs of Personal Property for Purposes of Taxation is the subject of a monographic note to Buck v. Miller, 62 Am. St. Rep. 448-477.

The Constitutional Requirement as to Uniformity in Taxation is discussed in its application to corporations in Henderson v. London etc. Ins. Co., 135 Ind. 23, 41 Am. St. Rep. 410; Detroit Citizens' St. Ry. Co. v. Common Council of Detroit, 125 Mich. 673, 84 Am. St. Rep. 589; note to St. Louis etc. Ry. Co. v. Paul, 62 Am. St. Rep. 175.

FLETCHER v. JOHNSON.

[139 Mich. 51, 102 N. W. 278.]

CONTRACT to Chill Bidding at Public Sale.—Two persons who desire to purchase the same property at public sale cannot make a valid agreement that one shall buy for the benefit of both, thereby preventing competitive bidding between themselves, although they do not design to purchase the property at less than its value. (p. 401.)

Charles R. Henry, for the complainant.

Joseph H. Cobb, for the defendant.

[51] HOOKER, J. Complainant seeks by the bill in this cause the specific enforcement of a contract for the purchase, [52] for complainant's benefit, of certain shares of stock in a corporation. The corporation referred to is the Alpena Water Company, and both parties were at the time of the transaction stockholders therein, and each was apparently desirous of obtaining a majority of the stock of the corporation.

James D. Turnbull was at one time a stockholder, and owned at the time of his death two hundred and ten shares of this stock, of the par value of ten thousand five hundred dollars. This, with other stocks, had been assigned by him to the Alpena National Bank as security for a large indebtedness. Turnbull was also indebted to defendant Johnson, who was a director and vice-president of the bank. In addition to the indebtedness mentioned, Turnbull was liable to Johnson as accommodation indorser upon paper of his held by the bank. To secure Johnson, as well as for the purpose of affording additional security to the bank, Turnbull had executed to Johnson a bill of sale covering a large amount of forest products, in trust for such purposes, which trust Johnson accepted. The complainant asked the bank to give him notice when it should determine to dispose of the water stock. About December 1, 1901, the board of directors of the bank considered the steps necessary to be taken in order to foreclose and cut off the equity of the Turnbull estate in these stocks to enable it to realize thereon in payment of its claims, and it was decided that the stocks should be offered at public sale, the proceeds to be accounted for to the estate after satisfying the obligations. Upon learning this the complainant telephoned Johnson to call upon him, and an interview was had, at which complainant told him that he knew that the

complainant wanted to obtain this stock, and asked what they better do, and whether he should "go in there and bid against him" (Johnson). This resulted in an agreement that, if complainant would not bid against Johnson, the latter would buy the stock from the bank, one-half on complainant's account. The stock was not sold at public sale, but Johnson obtained the bank's interest, and afterward adjusted [53] the matter with the estate in a way to perfect his title to this stock. Complainant gave him his check for half of the cost of his purchase, and defendant accepted it, though he afterward returned it, and refused to give complainant any of the stock. Upon hearing the cause, the court dismissed the bill, holding that the contract between the parties was opposed to public policy, and void. The complainant has appealed.

The evidence fairly shows that each of these persons desired the stock, or at least that the other should not have it all. Apparently, it was a question of control of the company. To avoid competition between them, they agreed that one should bid for both, and that there should be no bidding against each other, and that the stock should be divided and the expense shared equally.

The question is resolved into this: May two persons, who desire to purchase the same property, which is to be offered for sale, agree between themselves that one shall purchase for the benefit of both, thereby preventing competitive bidding between themselves. The authorities are, perhaps, not in entire harmony upon this subject, but there is a near approach to uniformity upon the proposition that when the object of the contracting parties is to prevent competition at the sale, to the end that the property may be bought for less than its value, the contract is void. The cases cited by the complainant's counsel do not question that rule. The only reason that can be given for its nonapplication to the present case is that the parties did not design to buy the property for less than its value; in other words, it was their design to avoid paying an exorbitant price, liable to be bid by reason of their respective interests and necessities.

We think that the cases cited by counsel do not establish such a distinction, for none of them turn upon that point alone. The validity of the contract cannot depend on the price paid at the sale, but must rest on the terms of the agreement. Here no price was agreed upon to be bid, nor is there anything to indicate that each party did not [54] de-

sire to buy as cheaply as possible. The only inducement to the contract was a prevention of competition, which was expressly agreed upon.

In the case of Fisher v. Hampton Transp. Co., 136 Mich. 218, 98 N. W. 1012, a similar promise was held void on the ground that it was contrary to public policy. That case recognizes the rule that, where the circumstances show that the consideration for the promise is, in whole or in part, an attempt to prevent competition at a public sale, the contract is void. That was the express consideration here.

Upon the hearing the testimony showed certain conduct and conversations by and between these parties relating to the delivery and reception of the check, and counsel for the complainant claimed that a new contract was inferable therefrom, and amended his bill to conform to such claim. Upon an examination of the proof we are unable to find any intention on the part of Johnson to make a new contract. If at that time he accepted the check with an intention to deliver the stock, it was, in our opinion, a mere carrying out of the original contract. Even if we could assert the fiction of a legal inference against what we believe the proof shows to have been the fact, it would be an extraordinary spectacle for a court of equity to endeavor thus to avoid the consequences of an illegal contract, so far carried out as to have effected the object of preventing competition. The proof would have to be pretty clear to divorce the subsequent transactions from the earlier, and justify the conclusion that an entirely new and distinct contract was in contemplation by the parties, in no part resting upon the illegal consideration.

We are of the opinion that the learned circuit judge was right in his conclusion that the complainant could not be granted the relief sought.

The decree is affirmed, with costs.

Moore, C. J., and McAlvay, Grant, and Blair, JJ., concurred.

Contracts Having for Their Object the Prevention of Competition at a judicial sale are generally regarded as against public policy and therefore unenforceable: Camp v. Bruce, 96 Va. 521, 70 Am. St. Rep. 873; Tappan v. Albany Brewing Co., 80 Cal. 570, 13 Am. St. Rep. 174. A contract between two lien creditors whereby one of them is debarred from bidding at an orphan's court sale, the arrangement being entered into unknown to the heirs of the decedent, is held void in Barton v. Benson, 126 Pa. St. 431, 12 Am. St. Rep. 883, although the property was not worth the liens against it.

HALL v. MARSHALL.

[139 Mich. 123, 102 N. W. 658.]

SECRET MARRIAGE—Right of Woman to Homestead.—Where a secretly married woman has not lived on premises prior to the execution thereon of a mortgage by her husband, she is not entitled to a homestead as against the mortgagee, who was ignorant of her marriage. (pp. 405, 406.)

SECRET MARRIAGE—Right to Dower.—If a marriage is kept secret, but without any fraudulent purpose, the wife is entitled to dower as against a mortgagee in a mortgage executed by the husband alone. (p. 406.)

SUBROGATION by Mortgagee.—Where a man who has contracted a secret marriage executes a mortgage in which his wife does not join, and the proceeds of the loan are in part used to take up two valid existing mortgages on the property, the mortgagee will be subrogated to the liens of the former mortgages, and the wife is entitled to dower only in the surplus over and above the reinstated mortgage. (p. 406.)

Gray & Gray, for the complainant.

Julian G. Dickinson, for the defendant.

124 MONTGOMERY, J. William S. Marshall died intestate April 7, 1903. At this date he was the owner of a house and lot in the city of Detroit worth five thousand five hundred dollars, subject to the lien of complainant's mortgage, which is the subject matter of this proceeding.

In March, 1882, Mr. Marshall, his wife, Elizabeth, joining, gave to complainant a mortgage for seventeen hundred dollars, covering the house and lot referred to. On April 1, 1885, an additional mortgage was given for three hundred dollars. On November 10, 1885, the amount due on these mortgages, viz., two thousand and ninety-one dollars and fifty cents, was covered by a new mortgage for four thousand five hundred dollars, the complainant advancing an additional sum of two thousand four hundred and eight dollars and fifty cents. Mrs. Marshall having died in 1884, the two last-named mortgages were executed by Marshall alone, he being to all appearances a widower. He, in fact, was a single man at the date of the three hundred dollar mortgage, but complainant ascertained for the first time after Mr. Marshall's decease that he had been married to defendant in September, 1885.

Defendant claiming the premises as a homestead, this bill was filed to have complainant's lien determined, and for a foreclosure and sale. It was alleged in the bill that in

any view of the case, if the mortgage of November 10, 1885, should be held void, the two previous mortgages should be treated as subsisting liens, a proposition so plainly equitable that it appears not to be seriously contested.

The circuit judge decreed a sale, and directed the surplus, over and above the amount due by the terms of the first two mortgages, to be brought into court, that the rights of the contesting parties to the fund be determined. This order was carried into effect, and a surplus fund of two thousand and thirty-two dollars and eighty cents was paid into the hands of the register. The final decree determined that the defendant was entitled to dower rights in this surplus, and awarded her the sum of five hundred and six dollars and twenty-five cents on this account, but denied her claim that the premises were at the date of the mortgage a homestead, and awarded the remainder of the fund to complainant. Both parties appeal.

125 The complainant contends that defendant acquired no dower rights by her marriage, and defendant, on the other hand, contends that she not only acquired dower rights but homestead rights as well, and that, as a consequence, the mortgage of November 10, 1885, should be held void. Defendant further contends that, if this is not held, it should be held that her dower rights attached to the entire property, and is not limited to the surplus arising after satisfying existing encumbrances.

The most important question presented is whether at the date of the execution of the four thousand five hundred dollar mortgage the defendant had, as against one accepting in good faith a conveyance or mortgage from her husband, acquired a homestead right in the premises. The evidence is that she had not at the date of this mortgage lived upon the premises. She had never seen them at this time, and did not see them for years afterward. She continued to reside in Ohio, and for years bore her maiden name. During all the years prior to Mr. Marshall's death she never visited Detroit but once. This was in June, 1887. On this occasion she stopped at a hotel, but she went with her husband to the house in question, remained for about an hour, during which time the subject of a legal separation or divorce was discussed. She testifies that she then declared to her husband that she intended to remain in the house, but yielded to persuasion and left, returning to her home in Cincinnati. We think

these facts bring this case clearly within the holdings in Stanton v. Hitchcock, 64 Mich. 316, 8 Am. St. Rep. 821, 31 N. W. 395, and Black v. Singley, 91 Mich. 50, 51 N. W. 704. The defendant had not, before the date of the mortgage, so occupied these premises as to entitle her to claim homestead rights as against one who was ignorant of her marriage.

The complainant contends that defendant was not entitled to dower, and bases this contention on the claim that the concealment of her marriage operated as a fraud upon the complainant. We do not discover any evidence of a [126] fraudulent purpose, and think the circuit judge correctly held her entitled to dower.

The only question remaining is whether the circuit judge erred in limiting her claim to dower to the surplus over and above the reinstated mortgages. Under the provisions of sections 8920 and 8922 of 3 Compiled Laws, it is clear that, had the two first mortgages continued to be subsisting liens, the defendant would be entitled on foreclosure to dower in the surplus arising on a sale on foreclosure only. By the decree of the circuit judge, which we fully approve, these mortgages were reinstated, and we see no reason why the natural and equitable sequence should not be that the dower right acquired by the defendant is that, and that only, which she would have been able to assert had they never been discharged.

The decree will stand affirmed, without costs to either party.

McAlvay, Grant, Blair, and Ostrander, JJ., concurred.

The Question Whether a Homestead right can be asserted by a surviving wife who has lived apart from her husband and perhaps in another state is discussed in Duffy v. Harris, 65 Ark. 251, 67 Am. St. Rep. 925; Prater v. Prater, 87 Tenn. 78, 10 Am. St. Rep. 623; Stanton v. Hitchcock, 64 Mich. 316, 8 Am. St. Rep. 821; note to Succession of Christie, 96 Am. Dec. 412-418.

The Right to Subrogation is the subject of an extended monographic note to American Bonding Co. v. National Mechanics' Bank, 99 Am. St. Rep. 474-533.

GARRISON v. UNION TRUST COMPANY.

[139 Mich. 392, 102 N. W. 978.]

LIEN OF BANK on Proceeds of Draft Sent for Collection.—Where a draft is sent to a bank by a correspondent for collection, the collecting bank has a lien on the proceeds of the draft for the general balance of its account with its correspondent, unless it has notice that the draft is not the property of the correspondent. (p. 412.)

TITLE OF BANK to Paper Sent for Collection.—When a bank acts as agent for the collection of paper, the property does not pass from the depositor; but when the money has been collected and credited, the title passes. (pp. 413, 414.)

LIEN OF BANK on Proceeds of Draft Sent for Collection.—Where a state bank sends a draft to a savings bank for collection, indorsing it generally, and the savings bank then sends it to a private bank, indorsing it "Pay to the order of any state or national bank," and stamping a collection number on its face, the private bank, upon receiving payment of the draft has, as against the state bank, a lien on the proceeds for the general balance of its account with the savings bank, although the savings bank has become insolvent when notice of the collection reaches it. (pp. 417, 418.)

LIEN OF BANK—Disobedience of Instructions.—If a sight draft drawn against a car of grain in transit is accompanied with instructions to "return at once if not paid," and the bank to which it is sent, in accordance with its custom, holds the draft until the car arrives, when it is paid, the bank, by so doing, does not forfeit its right to a lien on the proceeds for the balance of its account with the forwarding bank. (p. 418.)

Angell, Boynton, McMillan & Bodman and Thomas A. E. Weadock, for the petitioners.

Bowen, Douglas, Whiting & Murfin, for the defendant.

393 BLAIR, J. On January 30, 1902, the State Bank of Carson City sent to the City Savings Bank a sight draft drawn by the Rockafellow Grain Company, Limited, upon the Vernon Milling Company, at Vernon, Michigan. The form of the draft was as follows:

"467.50. Carson City, Mich., Jan. 29, 1902.

"For car No. 20714, at sight, pay to the order of E. C. Cummings, Cash'r, four hundred sixty-seven and 50/100 Dollars.

"Value received, and charge the same to account of

"THE ROCKAFELLOW GRAIN CO., LTD.

"Per F. A. ROCKAFELLOW, Mgr.

"To Vernon Milling Co.

"No. 123 Vernon, Mich.

"Rockafellow Grain Co., Ltd."

On a perforated stub, the following:

"No protest. Take this off before presenting. If not paid, return without delay and state reasons given."

When this draft was received by the City Savings Bank, it bore the following indorsement:

"Pay City Savings Bank, Detroit, or order.
"STATE SAVINGS BANK OF CARSON CITY.
"Carson City, Mich. E. C. CUMMINGS,
"Cashier."

With the draft came a letter from the Carson City bank, of which the following only is important:

394 "Carson City, Mich., Jan. 30, 1902.
"City Savings Bank, Detroit, Mich.
"Gentlemen: I enclose for credit [here follow several items].
"For col., credit and advice,
"No. 123, Rockafellow Gr. Co. on Vernon Milling Co. $467 50
"No Protest.
"Yours truly,
(Signed) "IRA CUMMINGS,
"Ass't. Cash."

The difference between the manner in which items were treated when sent "for credit," and when sent "for col. [collection] credit and advice," was as follows: Items sent "for credit" were items drawn on other banks, and were credited by the City Savings Bank as soon as received. If they were not paid, the Carson City bank would be charged back with the amount. Items sent for "collection, credit and advice" were forwarded to some bank where the collection was to be made, and they were not passed to the credit of the Carson City bank until the collection had actually been made, at which time the Carson City bank would be credited and advised thereof.

On receiving this draft, the City Savings Bank marked upon its back: "Pay to the order of any State or National bank. City Savings Bank, Detroit, Mich. H. R. Andrews, Cashier"—and on its face, with a rubber stamp: "City Savings Bank. Collection, No. 4627, Detroit, Mich."

The City Savings Bank then sent the draft to Wm. D. & Arthur Garrison, at Vernon, with the following letter:

"CITY SAVINGS BANK.

"Detroit, Mich., 1/31, 190

"W. D. & A. GARRISON, Esq., Cashier, Vernon.

"Dear Sir: I enclose for collection, and Cr.

"Please

"Report by

"Number. Kindly follow instructions below.

"4627 No Pro.$467 50

C. C. No. 2123.

395 "Protest all items unless otherwise instructed.

"Advise payment promptly and return at once if not paid.

"When unpaid, give reason.

"Respectfully yours,

"H. R. ANDREWS,

"Cashier."

The draft was paid February 8th. The reason why it was held was because the car of grain against which the paper was drawn had not arrived. On the same day, February 8th, the Garrisons credited on their books the account of the City Savings Bank with the amount of the collection, and sent to the City Savings Bank notice of this credit as follows:

"Vernon, Mich., Feby. 8/02.

"We credit your acc't with No. 4627, $467.50.

"W. D. & A. GARRISON, C. S."

This notice was written upon the letter of the City Savings Bank of January 31st, which was returned to the City Savings Bank, reaching Detroit at the opening of the bank, Monday, February 10th, at which time the bank had ceased to do business, and was in the hands of the banking commissioner. Under authority of the banking commissioner, the Garrisons were charged with the amount of the collection, and "State Special Account" was credited with the same amount for the account of the State Bank of Carson City. After this credit was made, the Carson City bank was notified as follows:

"CITY SAVINGS BANK,

"Detroit, Mich.

"Detroit, 2/10.

"Your favor of the —— instant received with stated enclosures.

"Your No. or date	We credit	For collection."
123	$467 50	

On February 8th, at the close of business, the account of the Garrison bank with the City Savings Bank showed a credit balance of $1,378.13. This includes a deposit of $707.05 made on that day. The Garrisons had for a number [396] of years carried a balance at the City Savings Bank, and for twelve or fifteen years had been making collections for the City Savings Bank in the same manner as done in this case, crediting the proceeds of such collections to the City Savings Bank against such balance on a running account existing between them. The Garrisons had no knowledge of the relation which the City Savings Bank bore to the draft in question, except so far as was disclosed by the indorsement on the back thereof, by the rubber stamp on the face thereof, and the letter of instructions sent to them by said bank, and did not know, if such was the fact, that the paper was the property of the Carson City bank, and had only been turned over to the bank for collection.

The City Savings Bank was the correspondent of the Carson City bank, and they had been doing business with each other for some time. There was a running account between the two banks, and there were no remittances of cash, but the course of their dealings was entirely a matter of debit and credit. This was also the case with the bank of the Garrisons.

On the twelfth day of February, 1902, the Union Trust Company was appointed by the court receiver of the City Savings Bank, and on March 4th following an order was made directing said receiver to return to depositors all deposits made on the eighth day of February, 1902. Upon demand being made by the Garrisons for the repayment of their deposit of $707.05, the receiver refused to comply therewith, except after deducting the amount of the collection of $467.50. Thereupon the Garrisons filed their petition, praying for an order directing the receiver to refund the amount of their said deposit. The Carson City bank also filed a petition, alleging that the City Savings Bank received the proceeds of its draft above set forth on February 10, 1902, while insolvent, and praying for an order directing the payment to it of the sum of $467.50, with interest. The respondent, the Union Trust Company, receiver, answered the petitions, seeking the instruction [397] of the court, and asking that the petitions be consolidated and heard as one, and they were so heard. After hearing the proofs the court entered an order directing

the payment of $467.50 to the Carson City bank, and the payment to the Garrisons of $239.55, being the amount of their deposit of $707.05, less the amount of said collection of $467.50. From this order the Garrisons appeal.

After the order on these petitions had been entered, notice of appeal given, bond on appeal filed, and the proposed case on appeal prepared and served and presented for signature, counsel for the Carson City bank sought to have the order set aside, and to introduce proof of the insolvency of the City Savings Bank for a period of six months prior to the eighth day of February, 1902. This application was denied.

Counsel for the Garrison bank contend that, under the circumstances of this case, that bank had a lien upon the proceeds of the draft of $467.50 to secure the payment of its balance against the City Savings Bank; that the Carson City bank was merely a general creditor of the City Savings Bank as to the proceeds of the draft, and, as such, not entitled to a specific return of the amount collected; and that in any event the acceptance of the Garrison bank's deposit on February 8th of $707.05 was a fraud, from which no rights could accrue to the City Savings Bank.

The briefs filed on the part of the Carson City bank and of the Union Trust Company, receiver of the City Savings Bank, take the position, first, that the words appearing upon the face of the draft, viz., "City Savings Bank. Collection No. 4627, Detroit, Mich.," were notice to the Garrison bank that the City Savings Bank was acting as agent for collection, and not as owner of the draft; second, that the Garrison bank disobeyed the positive instructions that, if the draft was not paid promptly, it should be returned at once to the City Savings Bank.

In Gibbons v. Hecox, 105 Mich. 509, 513, 55 Am. St. Rep. 463, 63 N. W. 579, Mr. Justice Long, speaking for the court, said: [398] "The general rule derived from the cases is that the bank has a lien on all moneys, notes and funds of a customer in its possession, for any indebtedness of the customer to the bank which is due and unpaid. The reason given for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions. In Re Farnsworth, 5 Biss. 223, Fed. Cas. No. 4673, Judge Blodgett, of the United

States circuit court of Illinois, held that a bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after the filing of petition in bankruptcy, and can apply such proceeds upon the note. In Muench v. Valley Nat. Bank, 11 Mo. App. 144, the court say: 'The general lien of bankers is part of the law-merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed. A banker's lien does not arise on securities deposited with him for a special purpose; otherwise we have no doubt that when a discount has been made by the bank, and the note has matured, so as to create an indebtedness from the depositor to the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or which it afterward acquires in the course of business with him, may be applied to the discharge of his indebtedness to the bank; and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right, and placed by him with the bank for collection.'" See, also, 1 Morse on Banks and Banking, 4th ed., secs. 324, 338; Cockrill v. Joyce, 62 Ark. 216, 35 S. W. 221. In the case last cited the paper was deposited for collection and credit. The court say: "The law on this subject is well settled, and is thus stated by a recent writer: 'A banker has a lien on all securities of his debtor in his hands for the general balance of his account, unless such a lien is inconsistent with the actual or presumed intention of the parties. The lien attaches to notes and bills and other business paper which the customer has intrusted to the bank for collection, as well as to his general deposit account. And so, if the securities be deposited [399] after the credit was given, the banker has a lien for his general balance of account, unless there be an express contract or circumstances that show an implied contract inconsistent with such lien': 1 Jones on Liens, 2d ed., sec. 244."

We find no circumstances here to take the case out of the general rule, but, on the contrary, the circumstances clearly entitled the Garrison bank to a lien upon the proceeds of the draft, as against the City Savings Bank, unless it had notice that the latter bank was merely an agent for collection or had disobeyed its instructions, as contended by the receiver, which we shall discuss later on.

The important question, however, remains—whether the Garrison bank was entitled to a lien on the proceeds of the draft as against the Carson City bank, the owner of the draft. We think that, under the circumstances disclosed by this record, it was. The State Bank of Carson City indorsed the draft over generally—"Pay City Savings Bank, Detroit, or order"—which constituted prima facie evidence of ownership of the draft by the City Savings Bank. The instructions sent by the latter bank to the Garrison, that the draft was inclosed "for collection and credit" did not, in view of the unbroken course of dealing between the banks, impugn their apparent title: Cody v. City Nat. Bank, 55 Mich. 379, 21 N. W. 373.

Although the proceeds of the draft were not to be credited to the Carson City bank until collected, it never was contemplated that the money, when collected, should be remitted to the Carson City bank. The instructions were explicit that, when collected, the proceeds should be credited to the transmitting bank. The Carson City bank had no thought of the proceeds of the collection forming a special fund to be held for it, but intended to rely in this instance, as it had in all its past transactions, upon the credit of the City Savings Bank, and its financial responsibility. As testified by Mr. Fuehrer, who was with the City Savings Bank at the time of the transactions in question: "The State Bank of Carson City and the City Savings [400] Bank had been doing business for some time. The City Savings Bank was the correspondent of the Carson City bank. The manner in which this draft came to the City Savings Bank was not unusual in any way. It came in the customary way. There was a running account, as it were, between the State Bank of Carson City and the City Savings Bank. That is true, also, as between the City Savings Bank and the bank of W. D. & A. Garrison, at Vernon. There were debits and credits on the books of each of them—I mean the City Savings Bank books and the Carson City bank books.

"Q. I suppose there would also be actual remittances of cash or was it all a matter of debit and credit? A. All a matter of debit and credit. That was true, also, as between the City Savings Bank and the Garrison bank."

Under such circumstances, if the collection had been credited and reported to the City Savings Bank by the Garrison bank, and to the Carson City bank by the City Savings Bank,

while solvent, the right of the Garrison bank to retain the proceeds of the collection would be unquestionable, under the arrangement between the respective banks. Must the Garrison bank lose its lien because the City Savings Bank had closed its doors when notice of the collection reached it?

Although the rule is well established that, when a bank acts as agent for the collection of paper, the property does not pass from the depositor, it is equally well settled that, when the money has been collected and credited, the title passes: Wallace v. Stone, 107 Mich. 190, 65 N. W. 113.

In Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. Rep. 533, 37 L. ed. 363, Mr. Justice Brewer, speaking for the court, said: "We also agree with the circuit court in its conclusions as to those moneys collected by subagents to whom the Fidelity was indebted, and which collections had been credited by the subagents upon the debts of the Fidelity to them, before its insolvency was disclosed, for there the moneys had practically passed into the hands of the Fidelity —the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents. It was the same as though the money had actually [401] reached the vaults of the Fidelity. It was a completed transaction between it and its subagents, and nothing was left but the settlement between the Fidelity and the principal—the plaintiff. The conclusions of the circuit court were based upon the idea that these collections could not be traced, because they had passed into the general fund of the bank. We think, however, a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made."

Under this high authority, the Garrison bank, having collected the draft without knowledge of the insolvency of the City Savings Bank, and having given that bank credit for the amount thereof, stood in precisely the same position as though it had actually transmitted the money to the bank.

Mr. Morse, in his work upon Banks and Banking, fourth edition, sections 591, 592, discussing the question "when a correspondent bank can hold paper sent to it for collection, or the proceeds of it, against the real owner," says:

"Sec. 591. When the last bank has successfully effected the collection, it is directly liable to the owner to pay the amount over to him only until such time as it has actually

remitted the amount to its predecessor. But some nice questions have arisen where such predecessor, intervening between the real owner of the paper and the bank actually receiving the money, becomes insolvent before the receiving bank has actually paid over the amount to this predecessor. The general rule of law is that, if a person employs an agent to collect money under such circumstances that the agent naturally employs a subagent to accomplish the actual collection, then the principal will be entitled to sue the subagent, and collect the money directly from him, without regard to the relationship or condition of accounts existing between such agent and subagent, and although the subagent had no knowledge that his employer was an agent, and not a principal. But if the owner has delivered the paper to the agent, with no indicia whatsoever to show that such agent is not the owner, and the subagent receives it from the agent, supposing him to be the owner, and gives him credit upon the strength [402] thereof, then the principal cannot recover from the subagent.

"Sec. 592. The leading case illustrative of this principle is that of Bank of the Metropolis v. New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115, 6 How. (U. S.) 212, 12 L. ed. 409. The latter gave to the Bank of the Commonwealth for collection a piece of negotiable paper indorsed generally, so that, for all that appeared upon it, the Bank of the Commonwealth might be the sole and real owner. The Bank of the Commonwealth forwarded it to its correspondent, the Bank of the Metropolis, with which it had a running account. That bank collected it, and gave the Bank of the Commonwealth credit for it upon the running account. The Bank of the Commonwealth failed, being indebted to the Bank of the Metropolis, and soon afterward the Bank of the Metropolis was notified of the true ownership of this piece of paper. The latter refused, however, to account to the New England Bank, which accordingly brought suit. The case is first reported in 1 How. (U. S.) 234, 11 L. ed. 115; but at a second trial at nisi prius in the lower court the rulings of the supreme court appeared to have been so misunderstood that the court reiterated them with much clearness and succinctness, in the following shape:

"1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the

Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection, merely, as an agent, then the Bank of the Metropolis was not entitled to retain the money, as against the New England Bank, for the general balance of the account with the Commonwealth Bank.

"2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.

"3. But if the jury find that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had [403] no notice to the contrary, and, upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error (the Bank of the Metropolis) is entitled to retain against the defendant in error (the New England Bank) for the balance of account due from the Commonwealth Bank.

"Chief Justice Taney, in the first opinion in Bank of the Metropolis v. New England Bank, expressly denied that the former was put upon its inquiry as to the true ownership of the paper; the indorsement by the true owner being general, and not 'for collection.' The cited cases also establish that the collecting bank, the subagent, may retain the money, if, without making an actual payment, it has merely given credit to the agent, or suffered balances to its own credit to remain undrawn with the agent upon the strength of these receipts. But unless it has made some payment, or suffered a balance to remain undrawn, or otherwise substantially relied on the agent's ownership, so that it would be unjustly prejudiced by the denial of that ownership, then it cannot retain the money. The true owner, by indorsing, 'For collection,' could save all question; but if he chooses to neglect this precaution, to indorse generally, and thereby to permit his agent to ap-

pear as the owner, then, if a subagent or any other person be misled, and a loss occurs, it is proper that the owner whose carelessness has given opportunity for the subagent to be deceived should, as between these two, bear the loss.

"Where a negotiable instrument indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank 'for collection and credit' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks."

The doctrine of Bank of the Metropolis v. New England Bank, 1 How. 234, 11 L. ed. 115, 6 How. 212, 12 L. ed. 409, has been adopted and applied in Vickrey v. State Savings Assn., 21 Fed. 773; Wood v. Boylston [404] Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366; Wyman v. Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133; Rathbone v. Sanders, 9 Ind. 217; Millikin v. Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; Carroll v. Exchange Bank, 30 W. Va. 518, 8 Am. St. Rep. 101, 4 S. E. 440. It has been repudiated in New York and some other states. We incline to the view of Mr. Morse (fourth edition, section 600) that the doctrine of the supreme court of the United States is the better one, both upon reason and authority.

Did the words, "City Savings Bank. Collection, No. 4627, Detroit, Mich.," stamped upon the face of the draft, notify the Garrison bank that the City Savings Bank was not the owner of the draft, but a mere agent for collection? This draft was sent to the Garrison bank for "collection and credit," in accordance with the uniform practice of twelve or fifteen years. The instruction to credit the proceeds of the draft to the City Savings Bank was inconsistent with the idea that that bank was a mere agent for collection, and was in harmony with the indorsement showing ownership. In the absence of any evidence in the record to invalidate the assumption, we think the Garrison bank might reasonably assume that the words were stamped upon the draft as a part of the bank's system of keeping track of its own collection items by number. We do not think these words, under the evidence in the case, tended to show that the City Savings Bank was acting as an agent for collection. As said by Mr. Justice

Campbell in Cody v. City Nat. Bank, 55 Mich. 379, 21 N. W. 373; "When the paper came into the defendant's hands, it had an unqualified blank indorsement of plaintiff's which presumptively transferred title to anyone who might become the holder. The fact that Rice and Messmore indorsed it for collection had no tendency to show that they held it themselves merely as agents for plaintiffs," etc.

Should the amount of the draft be deducted from the deposit of $707.05 because the Garrison bank disobeyed instructions? This certainly presents a very unusual question. Ordinarily, failure to follow instructions is complained of because such failure results in the partial or [405] total loss of the collection. But in this case the failure to follow instructions, if there was such failure, resulted in securing the entire collection of the draft. The draft in this case was drawn against a car of grain to arrive. It was presented at once, and the drawee did not refuse payment or acceptance, but stated that he was willing to pay it as soon as the car of grain arrived. He was a customer of, and had money on deposit with, the Garrison bank, and actually did pay the draft when the car arrived. As shown by the record:

"Q. Now, have you frequently had paper of this kind, drawn by the same party and on the same parties, frequently come to your bank for collection, drawn on the City Savings Bank? A. Yes, sir.

"Q. Was it customary for instructions of the kind that appear upon the stub attached to this draft to be upon ordinary paper that came from them—'If not paid, return without delay and state reasons given'? A. Yes, sir; they always put that upon the draft.

"Q. Now, what was your practice in collecting paper of this kind drawn by the same parties in the way I have described—getting there before the goods arrived? A. Held the draft until the goods arrived."

The natural construction of the language used was that the draft should be returned at once if payment was refused or if not paid promptly. The parties, by their course of dealing, had placed a practical construction upon the meaning of the adverb "promptly," which justified the course taken by the Garrison bank in this instance.

It results that, in our opinion, the Garrison bank was entitled to credit the amount of their collection upon their bal-

ance with the City Savings Bank, and to have repaid to them the amount of their deposit of $707.05.

A decree will be entered in conformity with this opinion.

McAlvay, Grant, Montgomery, and Ostrander, JJ., concurred.

LIEN OF BANKERS NOT FOUNDED ON CONTRACT.

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I. On General Deposits.

a. Lien in General.—It is a well-settled principle of the law-merchant that a bank, without an express agreement therefor, has a general lien on the moneys, funds and securities of a customer, coming into its possession in the course of their dealings, for any balance of general account or other indebtedness due the bank from the customer. This lien does not arise where there is a special agreement, or a particular mode of dealing, or other circumstances inconsistent with such a general lien; but ordinarily it attaches to the moneys and securities deposited in the usual course of business, not only against the depositor, but against the unknown equities of all others in interest: Note to Masonic Sav. Bank v. Bang's Admr., 4 Am. St. Rep. 202; Lehman v. Tallassee Mfg. Co., 64 Ala. 567; Gibbons v. Hecox, 105 Mich. 509, 55 Am. St. Rep. 463, 63 N. W. 519; Falkland v. St. Nicholas Nat. Bank, 84 N. Y. 145; People v. St. Nicholas Bank, 44 App. Div. 313, 60 N. Y. Supp. 719; Delahunty v. Central Nat. Bank, 63 App. Div. 177, 71 N. Y. Supp. 416; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. Rep. 486, 32 L. ed. 934; London Chartered Bank of Australia v. White, 4 App. Cas. 413; Misa v. Currie, 1 App. Cas. 554.

"The reason given for allowing the lien is, that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions": Gibbons v. Hecox, 105 Mich. 509, 55 Am. St. Rep. 463, 63 N. W. 519. "It is given by the law, upon the presumption that it is upon the faith of moneys and securities coming into the possession of the banker, in the course of general dealings, not especially devoted to other uses, a balance is suffered to accumulate against the customer": Lehman v. Tallassee Mfg. Co., 64 Ala. 567. The true principle upon which bankers' liens must be sustained is, "there must be a credit given upon the credit of the securities, either in possession or in expectancy": Russell v. Hadduck, 8 Ill. 233, 44 Am. Dec. 693.

It is further said that a banker's lien rests on the principle that, as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such debt, and it has, therefore, a right to retain such fund until payment is actually made: Falkland v. St. Nicholas Nat. Bank, 84 N. Y. 145; Bank of Marysville v. Windisch-Muhlhauser Brewing Co., 50 Ohio St. 151, 40 Am. St. Rep. 660, 33 N. E. 1054.

While this right is called a lien, strictly speaking it is not, when applied to a general deposit; for a person cannot have a lien on his own property, but only on that of another; and, as is well understood, funds on general deposit in a bank are the property of the bank. This right of a bank with respect to general deposits, which is sometimes called a lien, is more accurately a right of setoff, for it rests upon, and is coextensive with, the right to setoff as to mutual demands. The practical effect, however, is the same: Bank of Marysville v. Windisch-Muhlhauser Brewing Co., 50 Ohio St. 151, 40 Am. St. Rep. 660, 33 N. E. 1054; Callahan v. Bank of Anderson, 69 S. C. 374, 48 S. E. 293.

b. Setoff of Debt Against Deposit.—A bank may set off against a general deposit a debt due to it from the depositor: Second Nat. Bank v. Hill, 76 Ind. 223, 40 Am. Rep. 239; Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108; Citizens' Sav. Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143; Camden Nat. Bank v. Green, 45 N. J. Eq. 546, 17 Atl. 689; Tufts v. People's Bank, 59 N. J. L. 380, 35 Atl. 792; State Bank v. Armstrong, 15 N. C. (4 Dev.) 519; Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1483; Wheaton v. Daily Tel. Co., 124 Fed. 61, 59 C. C. A. 427. A bank having on hand funds of an insolvent bank, about to go into the hands of a receiver, may apply such funds on an indebtedness due from the insolvent bank, although its own officers are de facto officers of the insolvent bank: Slack v. Northwestern Nat. Bank, 103 Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51.

c. Application of Deposit to Indebtedness.—And where a general depositor becomes indebted to the bank, and the debt is due, the bank, by virtue of its lien or right of setoff, may, without the consent of the depositor, apply the funds on deposit, or so much thereof as is necessary, to the payment of the indebtedness: Merchants' etc. Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Home Nat. Bank v. Newton, 8 Ill. App. 563; Aurora Nat. Bank v. Dils, 18 Ind. App. 319, 48 N. E. 19; Knapp v. Cowell, 77 Iowa, 528, 42 N. W. 434; Muench v. Valley Bank, 11 Mo. App. 144; First Nat. Bank v. City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489; Winslow v. Harriman Iron Co. (Tenn.), 42 S. W. 698; Schuler v. Laclede Bank, 27 Fed. 424; Durkee v. National Bank, 102 Fed. 845, 42 C. C. A. 674. Since this rule results from the right of setoff which exists between persons sustaining the relation of debtor and creditor, the right of a bank so to apply deposits does not usually exist in any case where the bank could not successfully interpose the indebtedness of the depositor as a setoff in an action by him to recover the balanec on deposit due him: State v. Beach (Ind.), 43 N. E. 949.

In Louisiana, it seems that a bank cannot, as a general rule, apply a deposit on the depositor's debt to the bank: Morgan v. Lathrop, 12 La. Ann. 257; Hancock v. Citizens' Bank, 32 La. Ann. 590. In that commonwealth, however, a bank may attribute money on deposit to the payment of a debt to itself by its depositor, where it holds from him a special mandate to that effect: Succession of Gragard, 106 Ga. 298, 30 South. 885.

d. Maturity of Indebtedness.

1. In General.—The right of a bank to a lien on funds deposited with it by a customer, for his indebtedness to it, and the right of the bank to apply such funds, in whole or in part, to the payment of such indebtedness, do not, under ordinary circumstances, exist, unless the indebtedness has matured and is due: Merchants' Nat. Bank v. Ritzinger, 20 Ill. App. 27; State v. Beach (Ind.), 43 N. E. 949; Heidelbach v. National Park Bank, 87 Hun, 117, 33 N. Y. Supp. 794; Smith v. Eighth Ward Bank, 31 App. Div. 6, 52 N. Y. Supp. 290. This rule may be varied or excluded, however, by agreement between the parties: Roe v. Bank of Versailles, 167 Mo. 406, 67 S. W. 303.

Many authorities hold, at least at law, that a bank has no power or authority to appropriate the amount it owes a depositor to his unmatured debt, nor right of setoff, although he is insolvent: Birmingham Nat. Bank v. Mayer, 104 Ala. 634, 16 South. 520; Homer v. National Bank of Commerce, 140 Mo. 225, 41 S. W. 790; Bradley v. Seaboard Nat. Bank, 46 App. Div. 550, 62 N. Y. Supp. 51; Ellis v. First Nat. Bank, 22 R. I. 565, 48 Atl. 936; Oatman v. Batavian Bank, 77 Wis. 501, 20 Am. St. Rep. 136, 46 N. W. 881, and cases therein cited. It would seem reasonable, however, to accord the bank,

in such cases, at least an equitable right of setoff, provided there are no intervening rights of third persons: Kentucky Flour Co. v. Merchants' Nat. Bank, 90 Ky. 225, 13 S. W. 910, 9 L. R. A. 108; Demmon v. Boylston Bank, 59 Mass. (5 Cush.) 194; Thompson v. Union Trust Co., 130 Mich. 508, 97 Am. St. Rep. 494, 90 N. W. 294; Sweetser v. People's Bank, 69 Minn. 196, 71 N. W. 934; Hodgin v. People's Nat. Bank, 124 N. C. 540, 32 S. E. 887; Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710; Neeley v. Grayson County Nat. Bank, 25 Tex. Civ. App. 513, 61 S. W. 559 (citing, among other cases, Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483; Carr v. Hamilton, 129 U. S. 252, 9 Sup. Ct. Rep. 295, 32 L. ed. 669; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. Rep. 648, 30 L. ed. 707); Owens v. American Nat. Bank, 36 Tex. Civ. App. 490, 81 S. W. 988; note to St. Paul etc. Trust Co. v. Leck, 47 Am. St. Rep. 584.

2. **As Against Holder of Check.**—Indeed, some authorities take the view that the right of a bank to set off the unmatured debt of an insolvent depositor against his deposit is superior to the rights of a holder of a check on the deposit: Georgia Seed Co. v. Talmadge, 96 Ga. 254, 22 S. E. 1001; Thomas v. Exchange Bank, 99 Iowa, 202, 68 N. W. 780, 35 L. R. A. 379. Other authorities, however, take a contrary view: Merchants' Nat. Bank v. Robinson, 97 Ky. 552, 31 S. W. 136, 28 L. R. A. 760; Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, 77 N. W. 346. If the debt of the depositor is due, then it would seem clear that the bank is entitled to apply his deposit to the payment thereof, although the depositor has drawn a check against the deposit which has not yet been presented: Niblack v. Park Nat. Bank, 169 Ill. 517, 61 Am. St. Rep. 203, 48 N. E. 438, 39 L. R. A. 159; Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 72 Am. St. Rep. 259, 54 N. E. 946, 48 L. R. A. 565; Fort Dearborn Nat. Bank v. Blumenzweig, 46 Ill. App. 297; Mt. Sterling Nat. Bank v. Green, 99 Ky. 262, 35 S. W. 911, 32 L. ed. 568; Bank of Marysville v. Windisch-Muhlhauser Brewing Co., 50 Ohio St. 151, 40 Am. St. Rep. 660, 33 N. E. 1054; Callahan v. Bank of Anderson, 69 S. C. 374, 48 S. E. 293.

3. **Upon Death of Depositor.**—A bank may set off a note which it holds against a depositor and which matures the day after his death, against his deposit, paying the administrator the balance: Little's Admr. v. City Nat. Bank, 115 Ky. 629, 103 Am. St. Rep. 349, 74 S. W. 699, and cases therein cited. This decision seems to be opposed to Appeals of Farmers' etc. Bank, 48 Pa. St. 57; and in Jordan v. National Shoe etc. Bank, 74 N. Y. 467, 30 Am. Rep. 319, it is decided that, in the absence of facts entitling it to equitable relief, a bank, in action by the administrator of a deceased customer to recover a deposit due to the intestate in his lifetime, cannot set off a claim against the deceased not due until after his death, the statutes not permitting such a course.

e. **Character of Indebtedness.**—"The general rule in keeping the account of a depositor is," to quote from an Indiana decision where a bank sought to apply a deposit to the payment of a note upon which the depositor was surety, "that as money is paid in and drawn out a balance may be considered as struck at the date of each payment or entry, on either side of the account; and it is the right of the bank, in case the depositor becomes indebted to it by note or otherwise, and the deposit is not specially applicable to a particular purpose, or there is no express agreement to the contrary, to apply a sufficient amount thereof to the payment of any debt due and payable from the depositor to the bank. This results from the right of setoff, which obtains between persons occupying the relation of debtor and creditor, and between whom there exists mutual demands. It is familiar law, however, that mutuality is essential to the validity of a setoff, and that, in order that one demand may be set off against another, both must mutually exist between the same parties. Accordingly, it is settled that a bank can claim no lien upon the deposit of one partner made on his separate account, in order to apply it on a debt due from the firm; nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal and the others sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice: Watts v. Christie, 11 Beav. 546; Dawson v. Real Estate Bank, 5 Ark. 283; Sefton v. Hargett, 113 Ind. 592, 15 N. E. 513; Morse on Banking, 326. It follows that, in the absence of a contract giving it the right to do so, the bank could not have applied money due the petitioner, as a depositor, to the payment of the note upon which he was surety, any more than it could have successfully pleaded the note as a setoff in case the petitioner had brought suit to recover the balance due him on his deposit": Harrison v. Harrison, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111.

The foregoing extract from the opinion of the Indiana court is approved in O'Grady v. Stotts City Bank, 103 Mo. App. 666, 80 S. W. 696, where it is held that a bank is not entitled to appropriate the deposit of a customer to the payment of a check of a third person, drawn in favor of a fourth, and guaranteed by the depositor. In Ex parte Howard Nat. Bank, 2 Low. 487, Fed. Cas. No. 6764, it is said that a bank may set off a deposit against the depositor's liability as indorser, when the principal is insolvent.

f. **Ownership of Deposit—Equities of Third Persons.**

1. **In General.**—A banker's lien ordinarily attaches in favor of the bank upon the securities and funds of a customer deposited in the usual course of business, for advances supposed to have been made upon their credit, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or conduct inconsist-

ent with its assertion. It does not prevail, however, against the equity of a beneficial owner of which the bank has notice, either actual or constructive: Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. ed. 693; Bank of New South Wales v. Goulburn Valley Butter Factory, 71 L. J. P. C. 112, [1902] App. Cas. 543, 87 L. T. 88.

2. **Deposit by Trustee.**—Where trust funds are deposited with a bank, and the bank has notice of their trust character, it has no right to appropriate them to the payment of the individual debt of the depositor due from him to it: Clemmer v. Drovers' Nat. Bank, 157 Ill. 206, 41 N. E. 728; Bundy v. Town of Monticello, 84 Ind. 119; State Bank v. McCabe, 135 Mich. 479, 98 N. W. 20; Globe Sav. Bank v. National Bank of Commerce, 64 Neb. 413, 89 N. W. 1030; James Reynolds Elevator Co. v. Merchants' Bank, 55 App. Div. 1, 67 N. Y. Supp. 397. But if the bank has no notice that the deposit made by a trustee is not his private property, it may, according to the weight of authority, apply the fund to the payment of the depositor's indebtedness to it: Smith v. Des Moines Nat. Bank, 107 Iowa, 620, 78 N. W. 238; School District v. First Nat. Bank, 102 Mass. 174; Sparrow v. State Exch. Bank, 103 Mo. App. 338, 77 S. W. 168; Meyers v. New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504. Some courts incline to the opinion, however, that, although the bank has no notice of the trust character of the deposit, it cannot lawfully appropriate it to the payment of the depositor's individual debt: Burnett v. First Nat. Bank, 38 Mich. 630; Cady v. South Omaha Bank, 46 Neb. 756, 65 N. W. 906, 49 Neb. 125, 68 N. W. 358.

3. **Deposit by Agent or Factor.**—Where an agent or factor has deposited his principal's money in a bank, and the bank is chargeable with notice of the true ownership of the funds, it is not entitled to apply such funds to the payment of the individual debt of the agent owing to it: Baker v. New York Nat. Bank, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 104 Am. St. Rep. 885, 80 S. W. 604, 65 L. R. A. 820; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. Rep. 118, 34 L. ed. 724; Union Stock Yards Nat. Bank v. Moore, 79 Fed. 705, 25 C. C. A. 150. But a bank cannot be held to account to the owner of a fund which has been deposited by an agent in his own name and applied on his overdraft, if the bank has no knowledge of the agency: Kimmel v. Bean, 68 Kan. 598, 104 Am. St. Rep. 415, 75 Pac. 1118, 64 L. R. A. 785, and see the cases therein cited and reviewed. However, the cases of Cady v. South Omaha Bank, 46 Neb. 756, 65 N. W. 906, 49 Neb. 125, 68 N. W. 358, and Davis v. Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926, may, perhaps, lend themselves to a contrary interpretation. A bank may set off an indebtedness against deposits made by a third

person as agent of its debtor: Hayden v. Alton Nat. Bank, 29 Ill. App. 458.

4. **Deposit by Partner or Partnership.**—A bank has no lien, at least according to some authorities, on the deposit of a partner, on his individual account, for an indebtedness due it from the firm: International Bank v. Jones, 119 Ill. 407, 59 Am. Rep. 807, 9 N. E. 885; Raymond v. Palmer, 41 La. Ann. 425, 17 Am. St. Rep. 398, 6 South. 692; Adams v. First Nat. Bank, 113 N. C. 332, 18 S. E. 513, 23 L. R. A. 111. Some decisions hold, however, that a bank may apply the individual deposit of a partner to the payment of a partnership debt: Owsley v. Bank of Cumberland, 23 Ky. L. Rep. 1726, 66 S. W. 33; Eyrich v. Capital State Bank, 67 Miss. 60, 6 South. 615. Clearly, partnership deposits cannot be applied to the individual indebtedness of one of the members of the firm: Chanute Nat. Bank v. Crowell, 6 Kan. App. 533, 51 Pac. 575; Hodgin v. People's Nat. Bank, 124 N. C. 540, 32 S. E. 887; Coote v. Bank of United States, 3 Cranch C. C. 95, Fed. Cas. No. 3204.

II. On Special Deposits.

Where a person deposits funds or securities in a bank for a special purpose, such as to pay or secure the payment of a particular debt or obligation, the bank, if it has notice, has no lien on such special deposit for a general balance or for the payment of other claims due it from the depositor: Masonic Sav. Bank v. Bang, 84 Ky. 135, 4 Am. St. Rep. 197, and note; Judy v. Farmers' etc. Bank, 81 Mo. 404; Straus v. Tradesmen's Nat. Bank, 13 N. Y. St. Rep. 407; Manhattan Bank v. Walker, 130 U. S. 267, 9 Sup. Ct. Rep. 519, 32 L. ed. 959; Armstrong v. Chemical Nat. Bank, 41 Fed. 234, 6 L. R. A. 226. But if the bank has no notice that its customer makes a deposit for a particular purpose, or if the customer abandons the special enterprise in view of which he made the deposit, then it would seem that a banker's lien arises: Bank of Commerce v. Franklin, 90 Ill. App. 91; First Nat. Bank v. City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489.

III. On Paper Deposited for Collection.

a. **As Between Bank and Depositor.**—A bank has a lien on negotiable paper, deposited with it for collection, for debts due it from the depositor; and it does not lose this lien by his becoming insolvent and making an assignment for creditors, though it accepts the assignment, but makes no waiver of the lien: Cockrill v. Joyce, 62 Ark. 216, 35 S. W. 221; Gibbons v. Hecox, 105 Mich. 509, 55 Am. St. Rep. 463, 63 N. W. 519; Greene v. Jackson Bank, 18 R. I. 779, 30 Atl. 963; Studebaker Bros. Mfg. Co. v. First Nat. Bank (Tex. Civ. App.), 42 S. W. 573; Joyce v. Anten, 179 U. S. 591, 21 Sup.

Ct. Rep. 227, 45 L. ed. 332; In re Armstrong, 41 Fed. 381. Contra, Amelcungs Syndics v. United States Bank, 1 Mart. (O. S.) 321.

In Wood v. Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366, an attorney, who had been intrusted with a note for collection, deposited it in a bank for collection, without stating on whose account. The bank collected it and applied the amount on a debt of the attorney to the bank. The attorney becoming bankrupt, the bank made a settlement with his assignee, including the amount of the note. A year afterward, but as soon as he learned of the collection of the note, the owner demanded the proceeds of the bank, which being refused, he brought suit therefor. It was held, however, that the action could not be maintained. But a bank receiving a check for collection, with notice that it belongs to his principal, cannot, after the agent dies leaving an insolvent estate, apply the proceeds of the check to his individual debt to the bank: Overseers of the Poor v. Bank of Virginia, 2 Gratt. 544, 44 Am. Dec. 399.

b. As Between Collecting and Forwarding Bank.

1. In General.—When there have been, for several years, mutual and extensive dealings between two banks, and an account kept between them in which they mutually credited each other with the proceeds of all negotiable paper transmitted for collection when received, and accounts have been regularly transmitted from the one to the other and settled upon these principles, and upon the face of the paper transmitted it has always appeared to be the property of the respective banks, and the collecting bank has had no notice that the transmitting bank did not own the paper, and the paper has been transmitted by each of the banks on its own account, there is a lien, for a general balance of account on such paper, no matter to whom in fact it may belong. This doctrine was announced by the supreme court of the United States in Bank of the Metropolis v. New England Bank, 42 U. S. (1 How.) 234, 11 L. ed. 115, 47 U. S. (6 How.) 212, 12 L. ed. 409; and (except perhaps in New York: McBride v. Farmers' Bank, 26 N. Y. 450; Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455) has been pretty generally followed and accepted as a correct expression of the law: See the principal case, ante, p. 407; Wyman v. Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133; Russell v. Hadduck, 8 Ill. 233, 44 Am. Dec. 693; American Ex. Nat. Bank v. Theummler, 195 Ill. 90, 88 Am. St. Rep. 177, 62 N. E. 932, 58 L. R. A. 51; Rathbone v. Sanders, 9 Ind. 217; Wood v. Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366; Carroll v. Exchange Bank, 30 W. Va. 518, 8 Am. St. Rep. 101, 4 S. E. 440; Vickrey v. State Sav. Assn., 21 Fed. 773.

And if, in mutual dealings between banks, the collecting bank regards and treats the bank transmitting negotiable paper as the owner of the paper transmitted for collection, and has notice to the contrary, and upon the credit of such transmittance, made or anticipated in the

usual course of dealing between them, balances are from time to time suffered to remain in the hands of the bank making the remittance, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to a lien against the real owner of such paper, for the balance of account due from the bank transmitting the paper: Carroll v. Exchange Bank, 30 W. Va. 518, 8 Am. St. Rep. 101, 4 S. E. 440.

2. **In Case of General Indorsement.**—To quote from a recent Mississippi case: "Where a bank forwards checks for collection under a general indorsement in blank, the title to such collection, as to third parties dealing without notice, and not being put upon inquiry, passes to the bank to which they are forwarded, and the initial bank becomes simply a general creditor of the bank to which the items are sent for collection. So where in turn the second bank sends such items under a like indorsement in blank to its correspondent for collection, the same relationship is established between them, and the bank finally making the collection has the right to apply the proceeds thereof in any manner that may be authorized by the mutual understanding and course of dealing previously existing between it and the bank from which the items were received. The collecting bank is not required to make any inquiry to ascertain who, in point of fact, is the real owner of the proceeds of the collection, where the items for collection are received under a general indorsement. It has the right to assume that the ownership is in the bank forwarding the item to it: American Ex. Nat. Bank v. Theummler, 195 Ill. 90, 88 Am. St. Rep. 177, 62 N. E. 932, 58 L. R. A. 51. Any other rule would render it impossible for the bank making a collection to protect itself unless the remittance was in all cases made to the payee named in the check, and this would often be not in accordance with the real rights of the parties in interest. Where a bank collects checks received under a general indorsement, and remits the proceeds to the bank from which the items were received, it has discharged its whole duty in the premises, and the initial bank must look to its correspondent for payment; and when, by the course of dealing or understanding, the bank making the collection has the right to apply the proceeds of such collection to the credit of the bank from which the items were received, and upon making the collection does make such application, this is likewise a full discharge of its duty, and the initial bank has no right to hold the collecting bank for the proceeds of the collection": Continental Nat. Bank v. First Nat. Bank, 84 Miss. 103, 36 South. 189. See, in this connection, the principal case, ante, p. 407.

The supreme court of Oklahoma has decided that where a bank, in the due course of business, receives from a correspondent bank a check indorsed in blank, and in good faith parts with value or permits an existing indebtedness to remain unpaid by reason thereof, it is entitled to the proceeds of such check as against the real owner, even though

the check was not actually collected by such bank until after failure of the bank which transmitted the same to it: Winfield Nat. Bank v. McWilliams, 9 Okla. 493, 60 Pac. 229. Justice Burwell, in delivering the opinion in this case, remarked: "In the case of Bank of the Metropolis v. New England Nat. Bank, 42 U. S. (1 How.) 234, 11 L. ed. 115, it is said: 'If negotiable paper, not at maturity, be indorsed and delivered to a bank merely for collection, and be sent by such bank to another bank for collection, without notice that it does not belong to the former, the latter may retain the paper and its proceeds to satisfy a claim for a general balance against the former, if that balance has been allowed to arise and remain on the faith of receiving payment from such collections, pursuant to a usage between the two banks.' Many other authorities could be cited which are in harmony with the rule as enunciated by the above authorities, but the rule is so well settled that we deem further reference to precedents unnecessary. It is true that there are a few courts which hold that each bank through which a check, note, or draft is deposited for collection, even though it be indorsed in blank, acts as the agent of the real owner of the check, and in no event acquires a lien for a balance due from the bank from which it was received, unless the collecting bank part with a present consideration in good faith; but the weight and better authority are the other way."

3. **In Case of Indorsement for Collection.**—Where the owner of a negotiable instrument indorses it for collection, all persons and banks into whose hands it may thereafter come are chargeable with notice that the beneficial ownership of the paper has not passed, and they cannot secure a lien thereon, as they might were the indorsement general or in blank: National Bank of Commerce v. Johnson, 6 N. Dak. 180, 69 N. W. 49; Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429; Bank of Metropolis v. New England Bank, 47 U. S. (6 How.) 212, 12 L. ed. 409; Sweeney v. Easter, 68 U. S. (1 Wall.) 166, 17 L. ed. 681.

A bank which collects money upon negotiable paper sent to it by a bank to which it was indorsed for collection by the owner has no authority to apply it to an indebtedness due from the forwarding bank, and this irrespective of notice of its insolvency, or of any agreement between it and the collecting bank: People's Bank v. Jefferson County Sav. Bank, 106 Ala. 524, 54 Am. St. Rep. 59, 17 South. 728; Old Nat. Bank v. German-American Nat. Bank, 155 U. S. 556, 15 Sup. Ct. Rep. 221, 39 L. ed. 259. And, where a bank indorses a draft for collection to another bank, which bank in turn indorses it also for collection to a third bank, and the latter bank collects it, such bank cannot apply the proceeds to a debt due it from the second or intermediate bank, that bank having become insolvent, but the proceeds belong to the bank first making the indorsement, for the restricted indorsements give notice of such ownership to the collecting

bank: Bank of Sherman v. Weiss, 67 Tex. 331, 3 S. W. 299. To the same effect is Cecil Bank v. Farmers' Bank, 22 Md. 148.

4. **In Case of Notice of Ownership of Paper.**—In fact, it is safe to affirm, as a general rule, that where a bank has notice, actual or constructive, that commercial paper sent to it for collection does not belong to the forwarding bank, it cannot, as against the owner, retain the paper or the proceeds thereof for a balance or debt due it from the forwarding bank: Morris v. Alabama Carbon Co., 139 Ala. 620, 36 South. 764; Lawrence v. Stonington Bank, 6 Conn. 521; Van Amee v. Bank of Troy, 8 Barb. 312; Carroll v. Exchange Bank, 30 W. Va. 518, 8 Am. St. Rep. 101, 4 S. E. 440.

5. **In Case No Credit is Given on Basis of Paper.**—And even though the collecting bank has no notice that the forwarding bank is not the owner of the paper but is acting merely as an agent, still the collecting bank is perhaps not entitled, as against the real owner, to a lien for the general balance of its account with the forwarding bank, unless credit is given to such bank, or balances are suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealings between the two banks: Carroll v. Exchange Bank, 30 W. Va. 518, 8 Am. St. Rep. 101, 4 S. E. 440. Or, as some authorities say where a bank receives negotiable paper for collection from another bank, and no advances are made nor new credits given on account of such paper, and there is no evidence of the mode of dealing between them, the collecting bank cannot, on the failure of its correspondent, retain the proceeds of the paper, as against the true owner, on account of an indebtedness due from the forwarding bank: Lindauer v. Fourth Nat. Bank, 55 Barb. 75, Dod v. Fourth Nat. Bank, 59 Barb. 265; Jones v. Milliken, 41 Pa. St. 252. "The true principle upon which bankers' liens must be sustained is," it has been said, "there must be a credit given upon the credit of the securities, either in possession or in expectancy": Russell v. Hadduck, 8 Ill. 233, 44 Am. Dec. 693; American Ex. Bank v. Thuemmler, 94 Ill. App. 622.

"It may be taken as well settled," to quote from Milliken v. Shapleigh, 36 Mo. 596, 88 Am. Dec. 171, "that where there have been mutual and extensive dealings between two bankers, on a mutual account current between them, in which they mutually credit each other with the proceeds of all paper remitted for collection when received, and charge all costs and expenses, and accounts are regularly transmitted from one to the other, and balances settled at stated times upon this understanding, and where upon the face of the paper transmitted, it always appears to be the property of the respective banks, and to be remitted as such by each on its own account, and the balance of account is suffered to remain unsettled on the faith of such mutual understanding, and a credit is given upon the paper thus remitted or depositde, or upon the faith of that which

is expected to be remitted in the usual course of such dealings, there will be a lien for the general balance of accounts, and a right to retain the securities so received, or the amounts collected and on hand, as a credit upon the general balance in settlement of such advances.

"But where there is no such mutual arrangement or previous course of dealing between the parties whereby it is expressly or impliedly understood that such remittances of paper are to go to the credit of the previous account when received, and no advance is made or credit given on the basis of the particular bill, or upon the faith of such course of dealing and such future remittances, or where the special circumstances are inconsistent with the hypothesis of such mutual understanding, and the one bank merely passes the proceeds of the paper remitted for collection to the credit of the other on a subsisting indebtedness, which it happens at the time to have standing against the other, there is no such lien, and no right to retain and apply the money collected in that manner; but the real owner of the funds may maintain an action to recover the amount."

DETROIT v. BOARD OF INSPECTORS OF ELECTION.

[139 Mich. 548, 102 W. W. 1029.]

ELECTIONS—Voting Machines—Constitutional Law.—A vote cast by the use of a voting machine is a vote "given by ballot," within the meaning of a constitutional provision that "all votes shall be given by ballot," and therefore a statute authorizing the use of voting machines is not in conflict with such constitutional provision. (pp. 432, 437.)

ELECTIONS, Voting by Ballot.—A Constitutional Provision that all votes shall be given by ballot is a declaration of state policy, assuring to the voter a secret, as distinguished from an open or announced, vote. (p. 433.)

ELECTIONS—Voting by Ballot Defined.—The word "ballot" means the ball or ticket used in voting, the act of voting, the result of voting; the "voting by ballot" is a term used to distinguish open, viva voce, or public voting from secret voting. (p. 433.)

Timothy E. Tarsney, Lewis A. Stoneman and Frank Keiper, for the relator.

Sherman D. Callender, for the respondents.

549 OSTRANDER, J. The relator, the city of Detroit, filed its petition in the circuit court for the county of Wayne, setting out, in substance, the following facts: That at a meeting of the common council of the city of Detroit held March

7, 1905, the city clerk was directed by resolution to have voting machines placed in divers election districts in said city (amongst others, in the fourth district of the second ward), to be used at the election to be held Monday, April 3, 1905; that the resolution specified a particular kind of voting machine; that the board of inspectors of the named district, and each of them, have refused to obey the order of the common council, and assert that they will not obey it, giving as reason for their refusal that such method of voting is not a constitutional method. It is further set out that the particular voting machine is a complete and perfect piece of mechanism, thoroughly tested and reliable, constructed and operated in such a way as to permit an elector to vote secretly for a candidate or candidates of his choice upon any and all tickets, and that the same opportunity for discrimination is provided for the elector as if a paper ticket were used. The petition prays for a writ of mandamus, directed to the board of inspectors of said election district, commanding them to obey the resolution of the council. An order to show cause was issued, and the inspectors of said election district filed an answer, in which they admit the facts stated and set forth in the petition of relator, and they aver that they have refused and will refuse to obey the said order and direction of the common council to use the voting machine named, or any other voting machine, because they are advised that, under and by virtue of the provisions of section 2 of article 7 of the constitution of this state, all votes given at any election must be by ballot, [550] except as stated in said constitution, "and that the word 'ballot,' as contained in said provision of the constitution, does not permit the use of said voting machines, or any other voting machine, at elections, but means only a ticket upon which shall be written or printed the names of the candidates to be voted for at said election, and that the use of any other device is without warrant or authority of law." The cause coming on to be heard upon the petition and answer, the court denied the writ. The proceeding is brought into this court by certiorari, has been argued orally, and very full briefs have been submitted in behalf of both the relator and the respondents.

The act of the legislature which is brought into question is Act No. 61, Public Acts of 1897, 1 Compiled Laws, sections 3750-3758, as amended by Act No. 234 of the Public Acts of 1903. The title of the act is, "An act to authorize the use

of any thoroughly tested and reliable voting machine at any election held in this state." The act provides that any city council or village council may at any regular meeting authorize the use of such voting machines at any election to be held within their respective cities or incorporated villages during the ensuing year, but that "all voting by machines shall be a secret vote as hereinafter provided," and that all election laws not incompatible with the act are continued in full force and effect.

The pleadings before us, read in connection with the legislation referred to, not only assume, but afford assurance of the fact, that the voting machines in question will, if used, insure to the elector proper instruction in the use of the machines, absolute secrecy in voting, opportunity to vote for any person or candidate of his choice for any office to be filled at a particular election, a knowledge that he has voted, a correct record of the vote or votes, and a public and correct declaration of the total result of the election, and the recording and preservation of such result by officers chosen and sworn for that purpose.

It is with reference to this statement of facts, and upon the assumption of the verity of each of them, that we proceed [551] to discuss the only question before us, which is, Does the legislation in question contravene the provisions of section 2 of article 7 of the constitution? That section reads: "All votes shall be given by ballot, except for such township officers as may be authorized by law to be otherwise chosen."

The same language was used in the constitution of 1835, article 2, section 2.

There is but one other provision of the constitution relating to the method of voting at elections, and that is section 11 of article 4, which is: "In all elections by either house or in joint convention, the vote shall be given viva voce."

The question may be stated in simple form in this way: Is a vote given or cast by the use of the machine—secrecy, free choice of candidates, a correct record of the vote, and a correct record and announcement of the total vote given for each candidate being assured—a vote "given by ballot"?

All reasonable presumptions are to be indulged to support the questioned legislation. The constitution of Michigan is not a code, nor is the particular provision in any way self-executing. The language is imperative, and requires that

whatever system of conducting elections shall receive legislative sanction must have, as an integral, mandatory part of it, voting by ballot. In our opinion, the question is not to be determined as one of mere philology; nor should we apply, as we are asked to do, the rule of construction, often of great assistance, which limits the meaning of the words "given by ballot" to the vehicle used in voting or the method of depositing the vote which was probably in the contemplation of the framers of the constitution. Neither do we regard as controlling the fact that previous legislative enactments have, with few exceptions, and those like the one now before us, uniformly provided for written or printed tickets for use in elections. [552] We may assume that they have adopted the best known and most convenient way of voting by ballot—of obeying the constitutional mandate. And a ticket so provided was not a ballot, but, when properly deposited, or properly marked and deposited, by the elector, was a vote given by ballot: State v. Anderson, 100 Wis. 523, 17 N. W. 482, 42 L. R. A. 239.

We regard the provision of the constitution as a declaration of state policy, assuring to the elector a secret, as distinguished from an open or announced, vote. And in reaching this conclusion, we apply those rules of construction which observe the apparent purpose of the provision questioned; its generality; whether the language used is broader in meaning than the individual conceptions at the time of its adoption, and broad enough to sustain the legislation now considered.

The necessity for an early opinion in this case prevents any considerable references to the history of voting by ballot. The uses of the white and black balls in the club and in the lodge are familiar. Some of the early laws of the colonies provided that freemen might vote in the affirmative by the use of an Indian corn; in the negative, by putting in a bean. Lexicographers seem not agreed upon the derivation of the word "ballot." It has been said that it was adopted from the French language, without change of meaning (State v. Shaw, 9 S. C. 94, 138); that it comes from the Greek word meaning "to throw" (2 Cyc. 540). In common speech, the word "ballot" is used to mean the ball or ticket used in voting; the act of voting; the result of voting. It seems clear, however, that from the earliest times voting by ballot has been a term used to contradistinguish open, viva voce, or

public voting, and secret voting. "Voting by ballots is by a ticket or ball, and secrecy is an essential part of this manner of voting": 1 Bouvier's Law Dictionary, Rawle's Rev., tit. "Election," subd. "Ballots."

"The material guaranty of the provision of the constitution (section 6, article 6), that 'all elections by the people [553] shall be by ballot' is inviolable secrecy as to the person for whom an elector shall vote; and this guaranty is binding upon municipal governments in their regulation of elections": State v. Anderson, 26 Fla. 240, 8 South. 1.

"The expression 'election by ballots' had been expounded and construed by the various courts of last resort, and, with entire unanimity, they had declared it meant a secret ballot, and that the essential principle of this manner of voting was that the elector might conceal from every person the name of the candidate for whom he voted": Ex parte Arnold, 128 Mo. 256, 49 Am. St. Rep. 557, 30 S. W. 768, 1036, 33 L. R. A. 386. See, also, Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97; Ritchie v. Richards, 14 Utah, 345, 47 Pac. 670; Brisbin v. Cleary, 26 Minn. 107, 1 N. W. 825. References to the principal lexicographers will discover the same concept and definitions of ballot voting.

In Opinion of the Judges, 7 Me. 495, one of the questions answered was whether printed ballots came within the meaning of a constitutional provision which required that all elections shall be by written ballots. The answer was, in part: "It may be observed that those who framed the constitution undoubtedly intended to guard against many inconveniences in the before named elections, by excluding all those other modes by which questions are often decided in popular assemblies. This was the general object. The word 'ballot' may be considered as opposed to a vote by word or by signs—as, for instance, a vote by yeas and nays, or the common mode of voting, by holding up the hand, or by rising and standing till counted. It may well be supposed that the mode prescribed was preferred because it secures a greater degree of independence than any other in the exercise of the elective franchise." And the printed ballot was held good.

Henshaw v. Foster, 9 Pick. (Mass.) 312, 320, is as to the question presented, like the case last cited, and to that question the same answer was returned. But the opinion is of further interest here. It was urged "that the uniform and

constant use of manuscript ballots in elections amounts to a construction of the terms of the constitution which ought [554] now to be received as the only true one." Of this the court, speaking by Chief Justice Parker, said: "This practice of a mode of voting which is undoubtedly constitutional, founded in existing convenience, and never brought into competition with the use of printed votes, scarcely furnishes an argument against the latter. It merely shows a preference of one over the other, or that one during the time of the practice is more convenient than the other."

To the same effect is Temple v. Mead, 4 Vt. 535.

In the opinions and briefs in State v. Shaw, 9 S. C. 94, will be found an exhaustive discussion of the meaning of the word "ballot," its derivation and definitions, some history of its employment, and its meaning, as used in the constitution of that state. That constitution provided that "in all elections by the general assembly, or either house thereof, the members shall vote viva voce and their votes thus given shall be entered upon the journal of the house to which they respectively belong." Another section of the same instrument required the state to be divided into convenient circuits, and that for each the assembly should elect a judge by "joint ballot." In the election of certain judges, the vote was given viva voce; and upon application of the attorney general, who invoked the original jurisdiction of the supreme court of the state, and who contended that a secret ballot was by the constitution made imperative in such elections, there was a judgment of ouster.

The case, In re Voting Machine, 19 R. I. 729, 36 Atl. 716, 36 L. R. A. 547, is not precisely in point here, because of differences in the constitutional provisions of the two states. The opinion is of interest, however, because the court considered the argument that the framers of the constitution, as individuals, never had in mind such a method of voting. Of this it is said: "The question, however, is not what limitations they may have had in mind, by reason of the methods to which they were accustomed, but what the language of the constitution [555] means, or may reasonably mean, with reference to the matter before us."

In Opinion of the Justices to the House of Representatives, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430, the question presented was: "Has the general court the right to author-

ize the use of voting and counting machines at elections by the people of national, state, district, county, city or town officers?"

The constitution, as has been noticed, provided that representatives shall be chosen by written vote. It was held by three of the justices that the requirement might be complied with in voting by a machine which registers each vote cast without the use of separate ballots. One justice concurred, provided the results of the action of the machine in registering each vote were visible to the voter, and the work of the machine in adding up votes was done under the supervision of some person or persons charged with the duty of counting the votes cast. Three justices dissented upon the ground that "the turn of a wheel or dial punching a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not a written vote, within the meaning of the constitution." The majority opinion, which seems to have been prepared by Chief Justice Holmes, referring to the opinion in Henshaw v. Foster, 9 Pick. (Mass.) 312, in which it was said that the word "ballot" is ambiguous, which was the reason for the constitutional requirement of a written vote, contains this language: "No doubt, the picture in the minds of those who used the words was that of a piece of paper with the names of the candidates voted for written upon it in manuscript; but the thing which they meant to stop was oral or hand voting, and the benefits which they meant to secure were the greater certainty and permanence of a material record of each voter's act, and the relative privacy incident to doing that act in silence. It seems to us that the object and even the words of the constitution, in requiring 'written votes,' are satisfied when the voter makes a [556] change in a material object—for instance, by causing a wheel to revolve a fixed distance—if the material object changed is so connected with or related to a written or printed name purporting to be the name of a candidate for office that, by the understanding of all, the making of the change expresses a vote for the candidate whose name is thus connected with the device."

Our attention has been called to no decisions precisely in point. We have referred to those mentioned as supporting substantially our reasoning and the result arrived at. We do not regard the decision in State v. Anderson, 100 Wis.

523, 76 N. W. 482, 42 L. R. A. 239, as opposed in principle to either our reasoning or conclusions.

The purpose of the framers of our constitution in requiring that in all elections in either house of the legislature the votes shall be given viva voce is obvious. Equally obvious, in our opinion, is the purpose of the provision under consideration. It is undoubted, as is claimed by counsel for respondents, that as early as 1835 the method of voting by the use of tickets was known. It was nevertheless important that the policy of the new state with reference to the subject of voting at elections should be declared in the constitution. Agitation for the vote by ballot had only then begun in England, nor was it ended and the ballot assured until 1872. In 1835, and after, voting other than by ballot was practiced in the United States. To say that the purpose of the framers of our constitution was not to secure a particular mode of voting secretly, but was to make manifest in the organic and continuing law a policy to be perpetuated, is to give to the words of the instrument no forced or unnatural meaning.

As was said by Mr. Justice Campbell in People v. Cicott, 16 Mich. 283, 297, 97 Am. Dec. 141: "Our whole ballot system is based upon the idea that, unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy individual freedom of choice."

557 If we could imagine our constitution adopted to-day, and the legislation in question enacted, with reference to all the facts stated, to-morrow, would it be contended that the legislation was unconstitutional because not providing that "votes shall be given by ballot"?

We are of opinion that we should not hold the legislation to be invalid for any of the reasons urged. The circuit court for the county of Wayne was in error in denying the writ of mandamus, which should issue as prayed.

The proceeding being one of public interest and importance, no costs will be awarded.

Moore, C. J., and Carpenter, McAlvay, Grant, Blair, Montgomery, and Hooker, JJ., concurred.

Where the Constitution of a state declares that all elections by the people shall be by ballot, it means a secret ballot: Ex parte Arnold, 128 Mo. 256, 49 Am. St. Rep. 557; Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97.

CASES

IN THE

SUPREME COURT

OF

MINNESOTA.

GINTER v. ST. MARK'S CHURCH.

[95 Minn. 14, 103 N. W. 738.]

WATERS, SURFACE, Right to Control and Dispose of.—When an owner improves his land for a purpose for which such land is ordinarily used, doing only what is necessary for that purpose and being guilty of no negligence in the manner of doing it, he is not liable because as an incident to so improving, surface waters accumulate and flow in streams upon the lands of others. (p. 445.)

WATERS, SURFACE, Duty not to Injure Neighbors.—The common law respecting getting rid of surface waters in the improvement of one's premises has been so modified in Minnesota as to require him to so use his own as not unnecessarily or unreasonably to injure his neighbor. (p. 446.)

WATERS, SURFACE, Difference Between City Lots and Country Lands.—Though there is no distinction in the principle applicable to the case of surface water in the country and in the city, there may be a vast difference in the application of the principle. It does not follow because in the country an owner may be permitted to aid surface water on his own field in its exit through the natural channel upon a lower proprietor, thereby enabling a large volume to accumulate in the rainy period, the same thing can be done in thickly settled portions, where improvements are general, and a great drainage system has been provided. (p. 446.)

WATERS, Duty in Cities to Drain into Drains and Sewers.—In a city, the owners of improved property situate adjacent to a drainage or sewer system must connect therewith the water spouts and gutters of their buildings, and are not at liberty to permit the water to be collected and discharged in the public alleys, where it must enter upon and may injure adjoining premises. (p. 447.)

A. B. Jackson, for the appellant.

Lancaster & McGee, for the respondent.

[14] LEWIS, J. The complaint alleges that plaintiff was damaged by defendant in wrongfully and unlawfully permitting the rain falling upon the roof [15] of its church building and parish house to be collected by means of gutters and

discharged through conductors in unusual and destructive quantities against plaintiff's building, through its basement windows, and upon the adjoining ground, so that it formed large pools, and percolated through the soil and area walls into the basement, causing injury to merchandise therein located. The answer alleges that the gutters and conductors upon defendant's church building had been in use for a period of time exceeding fifteen years; that in erecting the building occupied by plaintiff certain basement windows upon the easterly side were provided, and, in order to secure light therefor, excavations were made on defendant's adjoining property, in which area walls were constructed; that the water falling from defendant's premises, if any, entered plaintiff's basement through such windows, and on account of the wrongful and unlawful trespass of plaintiff, or his grantor, in so constructing the same upon defendant's premises; that there were several other buildings located upon the alley in the rear of the premises in question, and that during heavy rainstorms water was collected in the alley to a depth of several inches, rushed past plaintiff's building, and entered the basement through the areas and windows in the rear thereof on a level or below the surface of the alley. It is alleged that from May 1 to October 1, 1902, there occurred in the city of Minneapolis several very severe, extraordinary, and unusual rainstorms, during which time rain fell with such force and in such volume as could not, by the exercise of ordinary prudence, have been anticipated or provided for, and that, if any waters from defendant's premises entered plaintiff's basement, it was due to such unusual and unforeseen circumstances.

The court found that the building occupied by plaintiff was erected in 1901, prior to October 1st; that it covered the entire lot, and extended from the sidewalk on Sixth street to the alley in the rear; that a basement extended over the entire distance, fifty feet of the front being two stories high, and the rear one hundred and seventy feet one story; that on the easterly side there were constructed three basement windows in the basement wall, forty-two inches in width and thirty-six inches in height, the tops of which windows were just above the level or surface of the ground; that for the purpose of admitting light to the basement an excavation was made opposite each window and an [16] area wall erected rising two inches above the level of the surface; that in June, 1902, the area wall op-

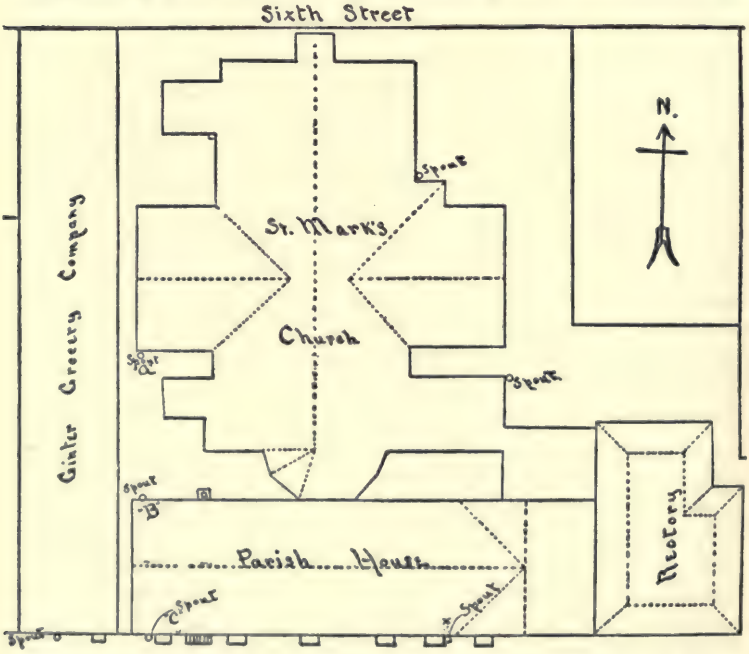
posite each of the windows was raised about four inches by the construction of a cement coping, making the total height above the grade about six inches; that the construction of the building with the basement windows in the manner aforesaid was a fact at all times known to the defendant corporation and its officers, as well as to the plaintiff, and no objection was ever made thereto either by plaintiff or defendant; that the lot in question, prior to the time of the erection of the store building, was three to four inches lower than the adjacent premises occupied by defendant's church building, and the natural slope or descent of block No. 222 from the rear of the premises occupied by plaintiff and defendant at the time complained of was toward Seventh street and Hennepin avenue, especially toward the southwesterly portion of the block, and was about twenty-four inches to each one hundred feet; that the premises occupied by defendant church are immediately east of plaintiff's premises, and consist of a tract one hundred and fifty-eight by one hundred and sixty-six feet, fronting on Sixth street, the rear upon an alley; that the church was erected upon the front three-fourths, more or less, of this tract, and had been so constructed for the period of fifteen years; that in 1901 there was erected on the rear portion of the tract, on a line with the alleyway in the rear of the church, a parish house; that these buildings were equipped with metal gutters, down-spouts, and conductors extending to or near the ground; that one-half of the church building faces the east and the other half the west; that half of the parish house roof slopes toward the public alley and the other half slopes toward the north; that all of the gutters and down-spouts attached to the eaves of the easterly half of the two roofs covering the parish house facing and sloping southerly and northerly were connected with the city sewer extending along Sixth street, and prior to the time the building occupied by the plaintiff was constructed the rain water falling upon the easterly sloping roof of the church and the easterly half of the two roofs of the parish house was by means thereof conducted into the sewer, and the water falling upon the westerly half of the church and parish house was, by means of gutters attached to the eaves and conductors leading to the ground, discharged in large or small amounts, according to the extent of the rain, upon the ground near the southeasterly line [17] of plaintiff's premises, and by natural descent flowed over and upon the lot now occupied by plaintiff; that defendant's church build-

ing is located about thirty-six to seventy-two inches distant from the easterly side of plaintiff's building.

The court further found that May 23 and 24 and August 30, 1902, very heavy rainstorms occurred in the city of Minneapolis, and large quantities of water were carried by the gutters and conductors upon the westerly one-half of the buildings, and by means thereof were transferred and discharged in large and destructive quantities upon the ground at one or more points within close proximity to the easterly wall of plaintiff's building, and more especially within three or four feet of the rear basement window at the southeasterly corner of plaintiff's building; that the water so falling during the May storm flowed over the rear area wall into the basement, and the waters from the August storm worked down beside and through such wall into the basement, causing damage to plaintiff's merchandise to the extent of six hundred dollars. The court also found that the rain falling upon the roofs of the other buildings situated upon or near the public alley during the time specified, in so far as it was not carried away by the sewer, fell upon or near the alleyway, and, by reason of the natural slope, ran off toward Seventh street and the southwesterly side of the alley. The court further found that prior to 1902 there was built and constructed along Sixth street a public sewer for the use of abutting owners; that it was of proper dimensions, and had general connection with the sewer system of the city; that it was in a receptive working order, suitable and adequate for the purpose intended; that the cost of connecting the conductors above mentioned with the sewer system during the spring or summer of 1902 would not have exceeded the sum of sixty-eight dollars; that the making of such connection was entirely feasible, and easily accomplished; and the court specifically found, by its twentieth finding of fact, that had defendant, prior to May 23, 1902, by means of sewer pipes properly laid, connected the westerly half of its church building gutters and down-spouts with such city sewer; all of the rain so falling upon the westerly half of defendant's building would have been transferred and discharged into the sewer, and would have flowed away from plaintiff's premises, and no injury would have been caused thereby. The court further specifically found that if, at the [18] time specified, no gutters, eave-troughs, or down-spouts had been erected upon the westerly portion of defendant's building, and the waters had been allowed to drop down from

the eaves to the ground, it would have spread out and flowed away from plaintiff's building by the natural decline toward Seventh street and Hennepin avenue, without causing the injuries complained of.

The assignments of error challenge certain of the findings of fact upon the ground that they are not supported by the evidence. It was conclusively shown that the southerly portion of the west transept and the west slope of the south half of the church roof, together with the north slope of the southerly half of the parish house roof, were connected with gutters and two spouts, which discharged their collection of water into the open space between the buildings upon defendant's premises, and that a gutter was constructed under the southerly eaves of the parish house, the east end of which was connected with the sewer, but the west end of the gutter was connected with a spout at the southwesterly corner of the parish house, and the water discharged into the alley. The accompanying plat will assist in explaining the [19] situation, as



it shows the relative positions of the building occupied by plaintiff, the church building with its transepts, and the parish house.

The evidence is ample to support the finding of the court that the waters thus collected and discharged into the disconnected spouts in the open space between the church and the store building ran out through the three-foot space between it and the parish house into the alley, there meeting the water discharged from the spout on the southwesterly corner of the parish house. Several witnesses testified that the waters thus coming together washed out the soil to some extent, creating a pool, described by one of the witnesses as ten feet wide during heavy rains; and that the water so formed could find no other outlet because of the grade, and consequently was raised to such a height that during the May storm it flowed over the area wall and into the grocery store basement, and during the August storm it worked down outside of and through the area wall into the basement; and that the quantity of water so collected was very heavy, and created such pressure as to force its way through the area wall. A plat was introduced, which had been made under the direction of competent engineers, upon which were marked the grades of the premises at various points and the location of other buildings upon the alley and in the vicinity.

From the evidence of the civil engineer and other witnesses the court was justified in finding that the natural lay of the land from defendant's premises sloped toward Seventh street and southwesterly, and from an examination of the plat it appears that there was a depression at the point where the waters met, so that before the water could pass in any direction it would have to rise five or six inches. The grade shows that at a point a few feet east of the southwesterly spout on the parish house there was a rise in the surface of the ground allowing no opportunity for the water to flow east, but from that point the grade fell to the east and south; consequently most of the water falling on the southerly slope of the parish house roof, had the gutter not been placed under the eaves, would have flowed away from plaintiff's premises. As to the water coming through the disconnected spouts upon the southwesterly portion of the church building, while there was no other outlet for the same except into the alley through the narrow space mentioned, yet according to the evidence the court [20] was justified in holding that the volume was unnecessarily increased by thus collecting the water and discharging it at the points stated. There is evidence to support the finding that the sewer constructed in Sixth street was con-

nected with the sewer system of the city, and was of sufficient capacity to carry away enough water to avoid injury under the circumstances, and that defendant might reasonably have connected the spouts with the sewer.

We are also of the opinion that the finding to the effect that the damage would have been avoided had such connection been made prior to the storms is sustained by the evidence. It was testified by certain witnesses for plaintiff that after the sewer connections were made in October, 1902, no water had collected in a pool at the rear of the parish house nor entered plaintiff's basement. Other testimony to the same effect was given, but stricken out—whether rightly or not we need not consider. It was also conclusively shown that the water falling on the roof of plaintiff's building was during the entire time connected with the sewer system, and that water from the buildings upon the alley and vicinity could not find its way into the basement by reason of the surface grade. And the evidence tends to show that the only water other than that delivered from defendant's premises was such as fell from the clouds into the open space between the two buildings and a small portion of the alley adjacent to the basement window and from the disconnected spout on the parish house. There was a dispute as to whether the gutters all overflowed, and some evidence was submitted by defendant tending to prove that the storms were of such extraordinary character that the sewers would not have taken care of it had the spouts been connected; that a wind was blowing from the south, and some water must have been thus driven into the basement window. All this has been considered, and the conclusion of the trial court must be accepted. Under the evidence the court was justified in finding that sufficient of the rain falling during the storms of May and August would have been carried off by the sewer system had the connection been made, and so have prevented the damage in question.

Having determined that the facts as found by the court are supported by the evidence, we come to the consideration of the legal questions involved. As we understand defendant's position, conceding the facts to be as found by the court, under the law of this state, [21] an owner has the right to dispose of surface water in any manner incidental to the improvement; that defendant had a right to construct the church and parish house upon its premises, to erect a roof thereon, and it was no concern of defendant where the waters were thereby inciden-

tally discharged; that, if plaintiff's improvement was made subsequently, it was his duty to protect himself. Plaintiff abandoned all claim for damages caused by water entering the basement through the windows on the east side of his building, and confines himself to damages arising from water entering the rear window.

So far as the excavation at the rear of the building and area wall are concerned, the evidence is ample to refute the charge that plaintiff did not use reasonable care to protect his premises. The area wall was constructed in the alley, made of brick and cement, inclosing an excavation about eighteen inches wide and two feet deep, and prior to the May storm was two inches above the surface of the ground. The evidence shows that the water entered the basement on that occasion by flowing over the area wall, which it would not have done except for the fact that defendant caused such volume of water to be concentrated in a depression in the alley that its first natural outlet was over the area wall. Upon discovering the fact that the area wall was not of sufficient height, in June following the May storm plaintiff caused his landlord to raise the area walls of all the windows by adding a four-inch cement coping. This, under the evidence and findings of the court, was a reasonable exercise of care to protect plaintiff's premises. During the August storm the waters collected with such force as to wash out the porous, sandy soil and brick of the area wall, thereby flowing through and under it, entering the basement window in a large stream. Plaintiff cannot be held negligent in failing, under the circumstances, to protect himself by constructing an area wall of sufficient strength and character to withstand the pressure of water collected in the manner stated.

The rule with reference to surface water, as stated in Brown v. Winona etc. Ry. Co., 53 Minn. 259, 39 Am. St. Rep. 603, 55 N. W. 123, has been followed in subsequent cases, and is as follows: When an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, he is not liable because, as an [22] incident of so improving, surface waters accumulate and flow in streams upon the lands of others. This rule was recently applied in the case of Werner v. Popp, 94 Minn. 118, 102 N. W. 366, where it was held that the upper proprietor did not necessarily cause damage to a lower proprietor by digging a ditch which shortened the route of surface waters falling upon his

land. In the case of Philips v. Taylor, 93 Minn. 28, 100 N. W. 649, it was stated that the party was required to exercise due care, but not, under all circumstances, to protect his neighbor. In Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, the rule is stated thus: The common-law rule is modified in this state by the rule that the party getting rid of surface water in the improvement of his own premises must so use his own as not unnecessarily or unreasonably to injure his neighbor. In Oftelie v. Town of Hammond, 78 Minn. 275, 80 N. W. 1123, attention was called to the fact that the doctrine of reasonableness was adopted in Sheehan v. Flynn, 59 Minn. 463, 61 N. W. 462, 26 L. R. A. 632, Gilfillan v. Schmidt, 64 Minn. 29, 58 Am. St. Rep. 515, 66 N. W. 126, 31 L. R. A. 547, Jungblum v. Minneapolis etc. Ry. Co., 70 Minn. 153, 72 N. W. 971, and Burnett v. Great Northern Ry. Co., 76 Minn. 461, 79 N. W. 523.

There is no distinction in the principle applicable to cases of surface water in the country, where lands are left largely in their natural state, and in cities, where the land is cut up into small lots for the purpose of improvement; but there may be a vast difference in the application of the principle. It all depends upon the circumstances of the particular case as to what degree of care is required of a party attempting to get rid of surface water upon his premises. It does not follow that because in the country an upper proprietor may be permitted to aid the surface water on his field in its exit through a natural channel upon a lower proprietor, thereby enabling large volumes of water in a rainy period to accumulate, the same thing can be done in a city in thickly settled portions, where improvements are general, and a common drainage system has been provided. Such a system of drainage to carry off surplus water is calculated to avoid the very difficulties which give rise to so much conflict between upper and lower proprietors in the country. The very object of constructing sewers along public streets adjacent to premises is to afford parties making improvements opportunity to connect therewith; and, if such connections can reasonably be made, upon what rule of law has a party [23] the right to maintain an improvement and refuse to avail himself of this means of getting rid of a common enemy, instead of turning it upon his neighbor's premises?

The doctrine of reasonableness and due care applies to this case, and under the facts found defendant should have availed

itself of the means at hand to prevent injury to plaintiff's property. It is immaterial that defendant first made its improvement. It is not seriously contended that defendant did not have notice of the change in conditions caused by the improvement of the adjacent lot. It was open to casual observation, and one of defendant's officers frankly admitted that he was familiar with the situation. Under such circumstances defendant was required to take notice of the effect liable to be occasioned by allowing the waters to run at large. While hardly necessary, it may be observed that defendant cannot take advantage of the fact that the area wall in question was extended about eighteen inches into the alley. If in so constructing the building plaintiff's landlord infringed upon any of the rights surrendered to the public when the alley was dedicated as a highway, those questions are not here involved. Presumably, defendant acquired no right, as against an adjacent proprietor, to use the alley as a sewer to carry off water, other means being reasonably obtainable.

Order affirmed.

Jaggard, J., Dissented, and his dissent apparently extended to every proposition of law and fact upon which the judgment of the majority of the court was founded. Thus, he denied that the evidence justified the finding that the sewer was of sufficient capacity to carry away the water, or that the damage to plaintiff could have been avoided if connection had been made with the sewer prior to the storms, and contended that a substantial part of the water doing the damage came from plaintiff's own premises. He said: "So far as the law of the case is concerned, I am at right angles with the majority of the court"; that the only cases upon the duty of draining surface waters into a sewer deny the existence of such duty, citing Sentner v. Tees, 132 Pa. St. 216, 18 Atl. 1114, approved in Hall v. Rising, 141 Ala. 431, 37 South. 586; and that "the overwhelming weight of authority is to the effect that in a city adjoining property owners have a right to drain surface waters onto public streets and alleys, subject to municipal control," citing Phillips v. Waterhouse, 69 Iowa, 199, 58 Am. Rep. 220, 28 N. W. 539; Hall v. Rising, 141 Ala. 431, 37 South. 586.

The Right of Land Owners to accelerate or impede the flow of surface waters is discussed in the monographic note to Mizell v. McGowan, 85 Am. St. Rep. 726-735. The general common-law rule is, that the owner of property may consume the surface water on his premises, or obstruct or divert the flow of it, without incurring any liability to his neighbors, whether above or below him, although they may be injured by the act, unless the interference amounts to a collecting of the water on his own land into a body and discharging it as such upon his neighbor's premises: Uhl v. Ohio River R. R. Co.,

56 W. Va. 495, 107 Am. St. Rep. 968; Barnett v. Matagorda Rice etc. Co., 98 Tex. 355, 107 Am. St. Rep. 636; Bradenberg v. Zeigler, 62 S. C. 18, 89 Am. St. Rep. 887. He has a right, however, to accumulate and cast such water in a body into a natural watercourse, without becoming liable to the lower riparian proprietor for damages, if the natural capacity of the watercourse is not exceeded: Baldwin v. Ohio Township, 70 Kan. 102, 109 Am. St. Rep. 414.

BROWN v. PINKERTON.

[95 Minn. 153, 103 N. W. 897, 900.]

STATUTES, Repeal and Re-enactment of.—If there is an express repeal of an existing statute and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes, so far as it goes, the repeal, and the portion continued is entitled to be treated as the law during the entire period of both statutes. (p. 452.)

LIMITATIONS OF ACTIONS, Retrospective Operation of.—Statutes of Limitations Affect the remedy, and are to be applied retrospectively. Therefore, a statute purporting to limit the time within which an action may be maintained to recover property sold at an administrator's or guardian's sale applies to sales made before its enactment. (p. 452.)

LIMITATIONS OF ACTIONS Applicable to Guardian's Sale, What Sale Within the Protection of.—Under a statute providing that no action for the recovery of any real estate sold by a guardian shall be maintained unless commenced within five years next after the termination of the guardianship, it is not necessary for the sale to have been valid or legal to be entitled to the protection of the statute, but it is sufficient that there were a license and a confirmation of the sale by the probate court, followed by a conveyance executed by the grantor as guardian. It is not material that the agreement to pay for the land sold was to pay for it in wheat at the market price, or that the conveyance executed by the guardian did not refer to the source of his authority or recite any of the proceedings by virtue of which he supposed himself authorized to act. (p. 454.)

H. L. Hayden, C. A. Fosnes and C. M. Greene, for the appellant.

Sorkness & Palmer and Wellington Brown, for the respondent.

154 LOVELY, J. This is the statutory action to determine adverse claims to a quarter section of land in Lac qui Parle county. The cause was tried to the court, who made findings of fact, and held that plaintiff was the owner of a designated interest in the property; that defendant acquired no interest or right in the same under a guardian's deed which was the

real subject of the controversy in the suit. There was a motion for a new trial, which was denied, and from this order defendant appeals.

The following facts are of record, not open to dispute, and in accord with the findings of the trial court: In 1886 Andrew Gilberg died intestate, owning the tract which is the subject of the litigation. He left, him surviving, a widow and one son, John F. Gilberg. Manford Horn was appointed administrator of the estate, and also guardian of the son, who was then fourteen years of age. On March 2, 1889, the guardian filed a petition in the probate court of Lac qui Parle [155] county, asking leave to sell his ward's interest in the real property referred to, upon the stated ground that it would benefit the ward, in that he would have the interest, and to provide for an outstanding mortgage thereon then due. This application was considered by the probate court, who, on May 14th following, by order authorized the guardian to sell at private sale the quarter section referred to, provided, before making the sale, the land should be appraised by three persons, who were appointed to estimate the value of the same, who should first take and subscribe an oath honestly to appraise the property at a fair cash valuation, and that it should not be sold for less than its estimated value, or until after the terms of the sale should have been published four weeks in a designated newspaper; also that such sale should not be made until a bond had been executed by the guardian to the judge of probate in the sum of fifteen hundred dollars, conditioned that such guardian account for the proceeds of the sale. On June 14th following, the guardian reported to the court that he had caused the estate in question to be appraised, that the required bond had been given, that he had taken the oath provided for, that the proper notice was published, and that he offered and sold the land in question upon the terms provided in the notice, as directed by the court, viz., for sixteen hundred dollars, to be paid as follows: Four hundred bushels No. 1 wheat in the fall of 1889, and six hundred bushels each succeeding year until fully paid, at market price, with interest at eight per cent per annum. Also that the guardian was not interested in the sale. Thereupon the same day an entry was made by the judge of probate finding that all the requirements in the order of sale had been complied with, and that the property had been sold to one Emil Jacobson for its appraised value. The sale was thereupon in terms confirmed,

and the guardian, in form, duly authorized to make a deed therefor to the purchaser.

In December, 1889, John F. Gilberg removed to Sioux Falls, South Dakota, where he has ever since resided. He became twenty-one years of age March 12, 1894, when the guardianship necessarily terminated. After the first payment by sale of wheat was made by Jacobson, there was a new oral agreement, by the terms of which Horn, the guardian, was to convey the lands, and Jacobson was to execute a mortgage thereon for a loan, and thereby raise money to pay for [156] the same. Thereafter, on November 26, 1890, the guardian executed a warranty deed purporting to convey to Daniel Emil Jacobson (the same person who purchased the land), for two thousand four hundred dollars, the property in question. This deed was in the usual form, contained full covenants of warranty, but made no reference to the probate proceedings as source of title or right to sell or convey the premises, except that in the body of the deed Manford Horn was designated as "guardian of John F. Gilberg," and the conveyance was signed, "Manford Horn, Guardian." This deed was delivered about the time it was executed, and was recorded December 16, 1890. In the course of time through mesne conveyances the quarter section attempted to be deeded to Emil Jacobson, whose real name was Daniel Emil Jacobson, passed to the defendant in this case, who purchased the same for full value, with no other notice of defects in the title than such as appeared of record in the probate court and the office of the register of deeds of Lac qui Parle county. There was a settlement between the ward and his guardian on January 21, 1899, which was approved by the probate court. In such settlement the ward received from the guardian a certain specified sum in full satisfaction of all claims and money due him from the guardian, for which he executed his release, whereupon Horn was discharged by the probate court from all liabilities of the guardianship trust. It would seem as if the ward took no further interest in the property until after he transferred his title, on July 27, 1903, to the plaintiff in this suit, for the inconsiderable sum of twenty-five dollars.

It appears from an examination of the records in this suit that, while the guardian was licensed to sell the property of the ward and the court confirmed the sale, and a deed, though informal, was made thereof, yet there were serious irregularities. There was in fact no notice thereof published; no bond

was given till a year after the sale; the land was not offered at the time it was directed to be sold; the sale to Jacobson was upon an oral agreement, rather than based upon a published notice; and the deed finally executed, though resting upon an order to sell by the court, was informal, and did not recite the probate proceedings upon which it was predicated. It must therefore be conceded that these defects in the procedure to dispose of the property by the guardian were of such substantial character that the sale would have been avoided if the defects had been questioned in time.

157 Certain conditions restricting collateral inquiry into the sale of real estate by guardians have existed in our statutes ever since, and probably before, the revision of 1866. They are prescribed in terms in section 4612 of the General Statutes of 1894. This is a statute to protect such transfers, without any limitation upon lapse of time, but takes immediate effect upon the sale itself. It provides that such sales shall not be avoided when it appears there was a license, an approved bond, the oath prescribed taken, the premises sold, the sale confirmed, and the property held by a purchaser in good faith, several of which conditions were wanting here. If there were no other law, we would be required to sustain the learned trial court in the conclusion reached that the title of the present owner, though based upon the payment of a full consideration, would on this collateral attack have to be set aside in favor of the purchaser who paid a mere pittance for the property. But the deed to Jacobson was made in 1890. The purchaser and his subsequent grantees entered into possession immediately upon the actual sale, and have continued to enjoy the same for more than thirteen years. The last purchaser, about two years ago having paid a very substantial and adequate price for the property, now invokes the protection of section 204, chapter 46, of the Probate Code of 1889, to be found in section 4611 of the General Statutes of 1894, which reads as follows: "No action for the recovery of any real estate sold by an executor or administrator, under this chapter, shall be maintained by any heir or other person claiming under the deceased, unless it is commenced within five years next after the sale; and no action for any estate so sold by a guardian shall be maintained by the ward, or by any person claiming under him, unless commenced within five years next after the termination of the guardianship; except that minors and others under legal disability to sue at the

time when the right of action first accrues may commence such action at any time within five years after the removal of such disability."

Preliminary to the attempted application of this act, it is urged that the guardian's sale was made before October 1, 1889, when the Probate Code from which we have quoted went into effect, and while section 50, chapter 57, of the General Statutes of 1878, was in force. Section 4611, supra (from [158] the Probate Code), will be found, upon reference, to exclude from its terms the words "persons out of the state," as well as the survival of the right of the heir to attack the sale five years after his return to the state; the reference to "persons out of the state" and "return to the state" constituting the only difference between section 50, supra, and the provision of the Probate Code referred to. The Probate Code of 1889, so called, as is well known, attempted a codification of all the laws embraced in the subject of probate jurisdiction; and there was an express repeal of section 50, chapter 57 of the General Statutes of 1878, and a re-enactment of the provision from which we have quoted, wherein the words "persons out of the state" and "return to the state" are omitted. In all other respects the statutory provisions are identical, and we need not stop to construe the effects of this legislation, further than to say that it is a recognized canon of statutory construction that where there is an express repeal of an existing statute, and a re-enactment of it at the same time, as here, or a repeal or re-enactment of a portion of it, the re-enactment neutralizes, so far as it goes, the repeal, and the portion continued entitled such part to be regarded as the law during the entire period of both statutes: Sutherland on Statutory Construction, 1st ed., sec. 134.

There was a period of time after the sale, however, when the heir was a resident of this state, while his right of action existed, when he might have commenced suit; and there is much force in the view that even if the limitations of the statute of 1878 would by its terms control his rights, because in force at the time of the sale, which we do not say, it did not go so far as to confer on him a privilege to leave the state, and thereby toll the limitation period indefinitely or until his return, which would be a favor not possessed or enjoyed by citizens. But as intimated, we need not give this consideration much force, since the act of 1889 (Probate Code) is unquestionably and distinctly a statute of limitation, and affects

the remedy solely; hence it follows, under the rule we have already adopted, that it is to be applied retrospectively: Stine v. Bennett, 13 Minn. 138 (153); State v. Messenger, 27 Minn. 119, 6 N. W. 457; Hill v. Townley, 45 Minn. 167, 47 N. W. 653. Therefore this statute, as it was adopted in 1889, became and continued to be of force and vital efficacy and of potent application to a sale on which more than five years had run [159] under this statute, when the attempt should be made to devest the purchaser of his title by legal proceedings in the name of the heir, and in such case it must be held to be operative if its terms refer to the sale here questioned; and we are not able to see any good reason why it does not embrace such transaction within its purview.

"Sale" is the effective, crucial and vital word of the statute. Necessarily there must have been a sale—not a valid or legal sale, for these need no protection, neither can it mean a sale lawfully ordered, but an irregular or void sale, by reason of the fact that the statutes which direct and authorize it have not been complied with. It is true that there must be something to give colorable grounds on which the limitation can be enforced, and we think and hold that these are to be found in the license of the probate court, and in this case a confirmation by that authority, followed by a conveyance executed by the grantor as guardian. Both the judge of probate and the guardian must be presumed to have supposed that they had legal authority for their actions, and we are of the opinion that nothing more is required to entitle the purchaser and those claiming under him to the benefits of the limitation provided for, than the existence of the license by a court having jurisdiction of the subject matter (estates of decedents), a judicial consideration by the court of the matter, and a determination that the grounds for the sale existed, and the attempt, as here made, to effectuate the direction of the court by a conveyance, although informal, yet resting upon the authority thus derived.

Statutes of limitations are statutes of repose, not rules of evidence, and, as said by Justice Cooley in Toll v. Wright, 37 Mich. 93—a case in principle very like the one now considered —we should seek, in construing them, to give the operation intended, for we must not defeat their purpose by a strictness of construction it was never designed they should receive. Let it be conceded that the guardian's sale in this case was void. The fact remains that the court assumed to order it

ostensibly, though mistakenly, under the provisions of law. There was a finding that the guardian had done his duty. There was a sale, though in fact without legal notice, and, following, a confirmation, as well as a conveyance; and these, in our judgment, were sufficient to put the statute invoked in behalf of defendant in operation. This conclusion is supported by the decisions of our [160] own and other courts: Jones v. Billstine, 28 Wis. 221; Toll v. Wright, 37 Mich. 93; Spencer v. Sheehan, 19 Minn. 292 (338); White v. Iselin, 26 Minn. 487, 5 N. W. 359; Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Smith v. Swenson, 37 Minn. 1, 32 N. W. 784; Burrell v. Chicago etc. Ry. Co., 43 Minn. 363, 45 N. W. 849; Rice v. Dickerman, 47 Minn. 527, 50 N. W. 698.

The agreement to pay for the land in the sale of wheat did not constitute a transfer and exchange of property. The purchase price was fixed, and the payments were to be made in money, though to be derived from the sale of a certain number of bushels of a merchantable commodity; and the results, in money, were to be turned over in stated payments. This constituted a sale, rather than a barter. While the conveyance was not formal, since it did not recite the source of authority upon which it was based, yet, for the purpose of giving effect to the limitation statute the license or order of sale, the confirmation and the reference to the guardian in the deed actually executed, permit no other inference than that such deed was made under a supposed warrant of authority, upon which the guardian acted.

It was undoubtedly the purpose of the legislature, when time has elapsed and property has greatly enhanced in value in the hands of innocent purchasers, to prohibit, in the interests of justice, the efforts and thrifty endeavors of "prowling assignees." For that purpose the limitation statute was enacted, and it is our duty to give it effective force when occasion arises.

Our examination of the findings of fact and law in this case indicates that the many irregularities in the probate sale were, in the judgment of the learned trial court, sufficient to avoid it. We have therefore reached the conclusion that the order appealed from must be reversed, and the cause remanded for further proceedings in conformity with the views above expressed.

Order reversed and new trial granted.

THE RETROSPECTIVE OPERATION OF STATUTES OF LIMITATION.

I. Of the Power to Enact Statutes Which will Operate Retrospectively.
a. General Rule, 455.
b. Restrictions upon the Legislative Power.
1. In Removing the Bar of the Statute, 456.
2. In Unreasonably Shortening the Time to Bring Actions, 457.
II. Of the Construction of Statutes with Respect to Their Retrospective Operation, 459.
III. Conflict of Laws, 461.

I. Of the Power to Enact Statutes Which will Operate Retrospectively.

a. **General Rule.**—When a statute of limitation is sought to be applied to a cause of action existing prior to its enactment, two questions necessarily present themselves for consideration: 1. Had the legislature power in enacting the statute to give it a retrospective operation? and 2. If the power is found to exist, has it been exercised? The first of these questions involves the constitutionality of the statute, and the second its construction. Subject to the limitations hereinafter to be stated, there is not now, and there has never been, any serious doubt of the power of the legislatures of the several states to enact statutes of limitation and to make them applicable to pre-existing causes of action: Dyer v. Gill, 32 Ark. 416; Edelstein v. Carlile, 33 Colo. 54, 78 Pac. 680; Hart v. Bostwick, 14 Fla. 162; Spencer v. McBride, 14 Fla. 403; Drury v. Henderson, 143 Ill. 315, 32 N. E. 186; People v. Simon, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801; Harrison v. Metz, 17 Mich. 377; People v. Wayne Co. Cir. Judge, 37 Mich. 287; Krone v. Krone, 37 Mich. 308; Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566; Willard v. Harvey, 24 N. H. 344; Fairbanks v. Woods, 17 Wend. 329; Warner v. Bartle, 39 App. Div. 91, 56 N. Y. Supp. 585; In re Moensch's Estate, 39 Misc. Rep. 480, 80 N. Y. Supp. 22; Pearsall v. Kenan, 79 N. C. 472, 28 Am. Rep. 336; Glover v. Flowers, 95 N. C. 57; Merchants' N. B. v. Braithwaite, 7 N. Dak. 358, 66 Am. St. Rep. 653, 75 N. W. 244; McKinney v. McKinney, 8 Ohio St. 423; Bates v. Cullum, 177 Pa. St. 637, 55 Am. St. Rep. 753, 35 Atl. 861, 34 L. R. A. 440; Garvin v. St. Clair, 17 Tex. 435; Landa v. Obert, 78 Tex. 33, 14 S. W. 297; Briggs v. Hubbard, 19 Vt. 86; Day v. Pickett, 4 Munf. 104; Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875; Baer v. Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; Bowman v. City of Colfax, 17 Wash. 344, 49 Pac. 551; Stewart v. Kahn, 11 Wall. 493, 20 L. ed. 176; Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; Bockbee v. Crosby, 2 Paine, 432, Fed. Cas. No. 1593; Wright v. Scott, 4 Wash. C. C. 16, Fed. Cas. No. 18,092; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886. A statute of limitations may, therefore, constitutionally apply to a cause of action against which no such statute was in existence when it was created, or may shorten the time allowed by the statute of limitation in existence at such creation, or though a

statute was in existence at such creation, may repeal it altogether, or amend or modify it so as to enlarge the time within which action may be brought.

b. Restrictions upon the Legislative Power.

I. In Removing the Bar of the Statute.—The effect of a statute of limitations may be considered with respect, first, to those cases in which it is conceded merely to terminate the right to maintain an action to recover a debt or to enforce some other obligation which, if the action were maintainable, would result in a judgment against the defendant for a sum of money; and second, to those cases in which the operation of the statute is to not only interpose a defense to an action to recover real or personal property, but also to vest prescriptive title thereto. As to questions of the first class, the supreme court of the United States, two judges dissenting, has affirmed that there is no vested right to the defense of the statute of limitations, and hence that, though its bar has become complete, the legislature may remove it by the repeal of the statute or by any other form of legislation clearly indicating a purpose to remove the defense which the statute had created: Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209, 29 L. ed. 483. With perhaps the exception of Dunbar v. Boston etc. Corp., 181 Mass. 383, 63 N. E. 916, the state courts have shown a disinclination to follow this decision and have held their statutes unconstitutional in so far as they might be construed as attempts to revive causes of action of any character after the bar of the statute of limitations had become operative against them: Board of Education v. Blodgett, 155 Ill. 441, 46 Am. St. Rep. 348, 40 N. E. 1025, 31 L. ed. 70; McCracken County v. Mercantile Trust Co., 84 Ky. 344, 1 S. W. 585; Lawrence v. City of Louisville, 96 Ky. 595, 49 Am. St. Rep. 309, 29 S. W. 450, 27 L. R. A. 560; Mellinger v. City of Houston, 68 Tex. 36, 3 S. W. 249; Ireland v. Mackintosh, 22 Utah, 296, 61 Pac. 901; City of Seattle v. De Wolfe, 17 Wash. 349, 49 Pac. 553; Eingartner v. Illinois S. Co., 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433. When, however, what is commonly known as a title by prescription has been created with respect to property, whether real or personal, such title is as much protected from subsequent legislative action as if it had been created by a grant, and cannot be destroyed or impaired by the repeal of the statute of limitations on which it was originally founded nor by any other exercise of the legislative power: Lewis v. New York etc. R. Co., 162 N. Y. 204, 56 N. E. 540; Tennessee C. & I. Co. v. McDowell, 100 Tenn. 565, 47 S. W. 153; Ireland v. Mackintosh, 22 Utah, 296, 61 Pac. 901; McEldowney v. Wiatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609; Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209, 29 L. ed. 483; Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. Rep. 720, 36 L. ed. 533; Toltec Ranch Co. v. Cook, 191 U. S. 532, 24 Sup. Ct. Rep. 166, 48 L. ed. 291.

2. **In Unreasonably Shortening the Time to Bring Actions.**—To deprive a person of all remedy for the enforcement of a right is equivalent to depriving him of the right itself, and this, in a constitutional government, is not permissible. Hence, one having the right to maintain an action cannot, by legislation under the guise of a statute of limitations, be deprived of that right. The utmost that can be done is to fix a time within which the right may be exercised, and the time so fixed must be reasonable. A statute which cuts off all remedy or so shortens the time within which it may be pursued as to practically cut it off is unconstitutional. The general language of the decision is that a reasonable time must be allowed: Higgins v. Mendenhall, 42 Iowa, 675; State v. Clark, 7 Ind. 468; West Feliciana R. Co. v. Stockett, 13 Smedes & M. 395; Howard v. Hildreth, 18 N. H. 105; Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; Culbreth v. Downing, 121 N. C. 205, 61 Am. St. Rep. 661, 28 S. E. 294; Gwin v. Brown, 21 App. D. C. 295; Chapman v. Douglas County, 107 U. S. 348, 2 Sup. Ct. Rep. 62, 27 L. ed. 378; McGahey v. State of Virginia, 135 U. S. 662, 10 Sup. Ct. Rep. 972, 34 L. ed. 304; Society for the Propagation of the Gospel v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156; Pereles v. Watertown, 6 Biss. 79, Fed. Cas. No. 10,980. The reasonable time must be allowed by the statute itself. Its defect in this respect cannot be supplied by the courts: Berry v. Ransdall, 4 Met. (Ky.) 292; Garrett v. Beaumont, 24 Miss. 377; Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; Osborn v. Lindstrom, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72, 46 L. R. A. 715; Osborn v. Jaines, 17 Wis. 573.

The statute creating or amending the limitation may on its face provide that it shall not go into effect until some subsequent designated period, and then the question arises whether this postponement of the taking effect of the statute may be regarded as equivalent to giving a reasonable time within which to commence the action, provided the time between the enactment and the taking effect is of sufficient duration to be regarded as reasonable. There are decisions refusing to consider any time allowed by the statute, unless such time is a part of the period subsequent to its taking effect: Price v. Hopkins, 13 Mich. 318; Gilbert v. Ackerman, 159 N. Y. 118, 59 N. E. 753, 45 L. R. A. 118. But the better opinion, in our judgment, is, that when the legislature by the terms of a statute of limitation postpones the time within which it will go into operation, the time of such postponement must be regarded as in the judgment of the legislature a reasonable time within which actions may be commenced, and, as all persons are required to take notice of the enactment of the statute, they must commence their actions before it takes effect, if the period within which it is possible for them to do so is not judicially deemed unreasonable: Hedger v. Rennaker, 3 Met. (Ky.) 255; Smith v. Morrison, 22 Pick. 430; Stine v. Bennett, 13 Minn. 153 (Gil. 138); Burwell v. Tulles, 12 Minn. 572 (Gil. 486); Duncan v.

Cobb, 32 Minn. 460, 21 N. W. 714; Eaton v. Supervisors, 40 Wis. 668; Wrightman v. Boone County, 82 Fed. 412.

What is a reasonable time to be allowed after the enactment of a statute of limitations within which actions or other proceedings must be brought or else deemed barred by it is primarily a legislative question with which the courts will not interfere, unless it is quite apparent to them that the obligation of the contract has been destroyed, or, at least, seriously impaired. "Perhaps no better rule as to what is reasonable time can be laid down than that it must be of sufficient duration to afford a full and fair opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate": Lamb v. Powder River L. S. Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558. Under ordinary circumstances a party has full opportunity "for resort to the courts for the enforcement of his rights" if he has time within which, by the exercise of ordinary diligence, to prepare and file his complaint, or to take such other proceeding as by the laws of the state is necessary for the commencement of his action, and this he can ordinarily do in a single day. Therefore, the cases have been, and must continue to be, rare in which the courts have pronounced the time allowed by the statute to be unreasonable. In the case last cited the limitation of three months within which to bring actions on foreign judgments was adjudged unreasonable. Doubtless the fact that the act applied to foreign judgments only was given paramount consideration by the court, both for the reason that the legislation savored of an attempt on the part of the legislature to discriminate unjustly between resident and nonresident creditors, and because the latter, by reason of their nonresidence, were less apt than domestic creditors to have prompt notice of the enactment of the statute and were likely to require more time within which to effectually "resort to the courts for the enforcement of their rights." "It is evident that no one rule as to length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another": McGahey v. State of Virginia, 135 U. S. 662, 10 Sup. Ct. Rep. 972, 34 L. ed. 304. This case is often spoken of as declaring the period of one year unreasonable, but the causes of action to which the statute applied were bonds and coupons of a state many thousands in number and many millions of dollars in value. They were made receivable in payment of taxes, and the statute undertook to require their presentment and tender in such payment within a year when it was clear from the circumstances that to so utilize these negotiable instruments was probably impossible, and if not absolutely impossible, could be accomplished only by a great sacrifice. The following limitations of time within which to prosecute actions were held to be reasonable under the circumstances disclosed in the cases cited: Thirteen months: Merchants'

N. B. v. Braithwaite, 7 N. Dak. 358, 66 Am. St. Rep. 653, 75 N. W. 244. One year: Cameron v. Louisville etc. Ry. Co., 69 Miss. 78, 10 South. 554; Adamson v. Davis, 47 Mo. 268; McMillian v. Werner, 35 Tex. 419; Wrightman v. Boone County, 82 Fed. 412. Ten months: Osborne v. Lindstrom, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72, 46 L. R. A. 715. Nine and a half months: Marsh v. Burroughs, Fed. Cas. No. 9111; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365. Eight and a half months: Smith v. Packard, 12 Wis. 371; Vance v. Vance, 108 U. S. 514, 2 Sup. Ct. Rep. 854, 27 L. ed. 808. Seven months: Power v. Kitching, 10 N. Dak. 254, 88 Am. St. Rep. 691, 86 N. W. 737. Six months: Myers v. Wheelock, 60 Kan. 747, 57 Pac. 956; Russell v. Akeley L. Co., 45 Minn. 376, 48 N. W. 3; Wheeler v. Jackson, 137 U. S. 245, 11 Sup. Ct. Rep. 76, 34 L. ed. 659; Turner v. New York, 168 U. S. 90, 18 Sup. Ct. Rep. 38, 42 L. ed. 392. Five months: Bigelow v. Bemis, 2 Allen, 496. Four and a half months: Stine v. Bennett, 13 Minn. 153 (Gil. 138). The time allowed, however short, will be regarded as reasonable if it is equivalent to the time which the holder of the cause of action retained under the old statute at the time of its displacement by the new: Culbreth v. Downing, 121 N. C. 205, 61 Am. St. Rep. 661, 28 S. E. 294; Carson v. Norfolk etc. R. Co., 128 N. C. 95, 38 S. E. 287. These decisions, however, appear to indicate that a time is not reasonable unless it is as great as that which remained under the old statute when it was amended, or supplanted. To so hold is to overlook the rule, now too well settled to admit of successful dispute, that the legislature may shorten the time within which suits on pre-existing causes of action may be brought.

II. Of the Construction of Statutes with Respect to Their Retrospective Operation.

Subject to the limitation already stated, that a person holding a cause of action must always be given a reasonable time within which to resort to the courts, there is no doubt that a statute of limitations may be made retrospective in its action by any language therein sufficiently showing such to have been the legislative intent: Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N. E. 185; Fish v. Genett (Ky.), 56 S. W. 813; Stern v. Bates, 9 N. Mex. 286, 50 Pac. 325; Alpha Mills v. Watertown S. E. Co., 116 N. C. 797, 21 S. E. 917; Garland v. Bear Lake etc. W. W. Co., 9 Utah, 350, 34 Pac. 368; State v. Brookover, 38 W. Va. 141, 18 S. E. 476; Wrightman v. Boone County, 82 Fed. 412, 31 C. C. A. 570, 88 Fed. 435. The decisions considering those statutes which are general in their terms and which do not specifically refer to pre-existing causes of action do not seem to us to be harmonious, and a number of them hold such statutes to be retrospective, and, therefore, to apply to pre-existing causes of action, where, notwithstanding such application, the party against whom the statute is pleaded had a reasonable time after its enactment within which to bring his ac-

tion: Walker v. Bank of Mississippi, 7 Ark. 500; Spencer v. McBride, 14 Fla. 403; Wade v. Doyle, 17 Fla. 522; Pritchard v. Spencer, 2 Ind. 486; Sleeth v. Murphy, 1 Morris, 321, 41 Am. Dec. 232; Elliott v. Lochnane, 1 Kan. 126; Root v. Bradley, 1 Kan. 437; Smith v. Kline, 3 Kan. 506; Holcomb v. Tracy, 2 Minn. 241 (Gil. 201); Stine v. Bennett, 13 Minn. 153 (Gil. 138); Hill v. Townley, 45 Minn. 167, 47 N. W. 653; Brown v. Pinkerton, 95 Minn. 153, ante, p. 448, 103 N. W. 897; Benson v. Stewart, 30 Miss. 49; Pike v. Jenkins, 12 N. H. 255; In re Van Dyke's Estate, 7 N. Y. St. Rep. 710; Acker v. Acker, 81 N. Y. 413; Osborne v. Lindstrom, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72, 46 L. R. A. 715; Bates v. Cullum, 177 Pa. St. 633, 55 Am. St. Rep. 753, 35 Atl. 861, 34 L. R. A. 440; Bowden v. Philadelphia etc. R. Co., 196 Pa. St. 562, 46 Atl. 843; Stoddard v. Owings, 42 S. C. 88, 20 S. E. 25; De Cordova v. City of Galveston, 4 Tex. 470; Grigsby v. Peak, 57 Tex. 142; Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283; Cleveland Ins. Co. v. Reed, 1 Biss. 180, Fed. Cas. No. 2889. These decisions are in conflict with the decided preponderance of authority. The general rule is, that a statute of limitations, or an amendment thereto, is to be considered as operating prospectively only, unless such construction is at variance with its language, and hence that causes of action which had become perfect prior to its enactment are to be deemed as not within its operation, or, if held to be within such operation, then the statute is to be applied only from the date of its enactment, and hence as not cutting off a cause of action until the lapse of the full statutory period computed not from the date of the maturing of the cause of action, but from that of the enactment or the going into effect of the statute: Curtis v. Boquillas L. & C. Co. (Ariz.), 76 Pac. 612; Hawkins v. Hensley, 4 Ark. 167; Baldwin v. Cross, 5 Ark. 510; Lee v. Leach, 9 Ark. 423; Calvert v. Lowell, 10 Ark. 147; Vaughan v. Parr, 20 Ark. 600; Fayetteville B. & L. Assn. v. Bowlin, 63 Ark. 574, 39 S. W. 1046; Benjamin v. Eldridge, 50 Cal. 612; Edwards v. White, 12 Conn. 28; Central Bank v. Solomon, 20 Ga. 408; Schneider v. Hussey, 2 Conn. 12, 1 Pac. 343; Dickson v. Chicago etc. R. R. Co., 77 Ill. 331; Hyman v. Bayne, 83 Ill. 256; Gridley v. Barnes, 103 Ill. 211; McMillan v. McCormick, 117 Ill. 79, 7 N. E. 132; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Walker v. People, 202 Ill. 34, 66 N. E. 827; State v. Clark, 7 Ind. 468; Dale v. Frisbie, 59 Ind. 530; State v. Parsons, 147 Ind. 579, 62 Am. St. Rep. 430, 47 N. E. 17; Gordon v. Mounts, 2 G. Greene, 243; Cassady v. Grimmelman, 108 Iowa, 695, 77 N. W. 1067; Thoeni v. City of Dubuque, 115 Iowa, 482, 88 N. W. 967; De Armas v. De Armas, 3 La. Ann. 526; Harrison v. Succession of Adger, 24 La. Ann. 565; Appeal of Deake, 80 Me. 50, 12 Atl. 790; Manning v. Carruthers, 83 Md. 1, 34 Atl. 254; Holyoke v. Haskins, 22 Mass. 20, 16 Am. Dec. 372; McKisson v. Davenport, 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507; Hathaway v. Washington M. Co., 139 Mich. 708, 103 N. W. 164; West Feliciana R. Co. v. Stockett, 13 Smedes & M. 395; Weber v. Manning, 4 Mo. 229; McCartney v. Alderson,

54 Mo. 320; Connecticut Mut. Life Ins. Co. v. City of St. Louis, 98 Mo. 422, 11 S. W. 969; Tice v. Fleming, 173 Mo. 49, 96 Am. St. Rep. 479; People v. Columbia Co. Suprs., 10 Wend. 363, 72 S. W. 689; Reid v. City of New York, 68 Hun, 110, 22 N. Y. Supp. 623; McMahon v. Arnold, 107 App. Div. 132, 94 N. Y. Supp. 775; Southgate v. Frier, 8 Okla. 435, 57 Pac. 841; Huber v. Zimmerman, 8 Okla. 573, 58 Pac. 737; Rotchford v. Union R. Co., 25 R. I. 70, 54 Atl. 932; Nichols v. Briggs, 18 S. C. 473; Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Walker v. Burgess, 44 W. Va. 399, 67 Am. St. Rep. 775, 30 S. E. 99; Lawyer v. Barker, 45 W. Va. 468, 31 S. E. 964; Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; Vaughan v. East Tennessee etc. R. Co., Fed. Cas. No. 16,898; Lamb v. Powder River L. S. Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558; Lewis v. Lewis, 7 How. 776, 12 L. ed. 909; Ross v. Duval, 13 Pet. 45, 10 L. ed. 51.

All the decisions agree that a statute of limitations can, under no circumstances, operate retrospectively to the extent of defeating actions and other proceedings which have been commenced before their enactment: Curtis v. Boquillas L. & C. Co. (Ariz.), 76 Pac. 612; Appeal of Deake, 80 Me. 50, 12 Atl. 790; Ridley v. Seaboard & R. R. Co., 124 N. C. 34, 32 S. E. 325; Webster v. Cooper, 14 How. 488, 14 L. ed. 510. Such statutes cannot be construed as intending this result, but even if no other construction were permissible, in view of the language actually employed, it could not be given effect without depriving the litigant of all remedy, and a statute seeking to do this would be unconstitutional.

III. Conflict of Laws.

As a statute of limitation is generally regarded as affecting the remedy only, it is evident that the statute in force when that remedy is sought must control. Of course, as hereinbefore shown, if the operation of the statute has been to create title by prescription, that title is not subject to legislative impairment, and therefore the statute may be successfully interposed as a defense to an action instituted after its repeal, where such defense is necessary to the defense of a prescriptive title. In all other cases, the statute in force when the action is commenced must control: Nickles v. Haskins, 15 Ala. 619, 50 Am. Dec. 154; Chandler v. Chandler, 21 Ark. 95; Beesley v. Spencer, 25 Ill. 216; Winston v. McCormick, 1 Ind. 56; State v. Swope, 7 Ind. 91; Terre Haute etc. R. Co. v. State, 159 Ind. 438, 65 N. E. 401; Sampson v. Sampson, 63 Me. 328; McKenzie v. Cook Co., 113 Mich. 452, 71 N. W. 868; Holcombe v. Tracy, 2 Minn. 241 (Gil. 201); Cook v. Kendall, 13 Minn. 324 (Gil. 297); Briscoe v. Anketell, 28 Miss. 361, 61 Am. Dec. 553; Callaway County v. Nolley, 31 Mo. 393; Forcht v. Short, 45 Mo. 377; Carson v. Hunter, 46 Mo. 467, 2 Am. Rep. 529; Gilker v. Brown, 47 Mo. 105; Coady v. Reins, 1 Mont. 424; Gillette v. Hibbard, 3 Mont. 412; Wilcox v. Williams, 5 Nev. 206; Gilman v. Cutts, 23 N. H. 376; Hazlet v. Critchfield, 7 Ohio, pt. 2, 153; Hall v. Prindle, 2 Ohio Dec. 261; Bige-

low's Exr. v. Bigelow's Admrs., 6 Ohio, 96; King v. Nichols, 16 Ohio St. 80; Heyward v. Farmers' M. Co., 42 S. C. 138, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42; Garland v. Bear Lake etc. I. Co., 9 Utah, 350, 34 Pac. 368; Royce v. Hurd, 24 Vt. 620; Schriber v. Town of Richmond, 73 Wis. 5, 40 N. W. 644; Patterson v. Gaines, 6 How. 550, 12 L. ed. 553. Therefore, if a statute of limitation is repealed and another on the same subject enacted, the time during which the old statute ran against the cause of action before such repeal is no longer to be considered where the bar of the statute had not become complete, and the cause of action is subject only to the new statute: Henry v. Thorpe, 14 Ala. 103; Nickels v. Haskins, 15 Ala. 619, 50 Am. Dec. 154; Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; Chandler v. Chandler, 21 Ark. 95; Morris v. De Celis, 51 Cal. 55; Beesley v. Spencer, 25 Ill. 216; Forsyth v. Ripley, 2 G. Greene, 181; Fish v. Genett (Ky.), 56 S. W. 813; Huber v. Zimmerman, 8 Okla. 573, 58 Pac. 737. A different and peculiar rule prevails in Louisiana and Texas: Union C. Manufactory v. Lobdell, 7 Mart., N. S., 108; Reeves v. Adams, 5 La. 288; Goddard's Heirs v. Urquhart, 6 La. 659; Xampi v. Orso, 11 La. 57; Thompson v. Scales, 11 La. 560; Whitworth v. Ferguson, 18 La. Ann. 602; Fisk v. Bergerot, 21 La. Ann. 111. It is to the effect "that upon the substitution of a new term of limitation, the time which elapsed under the former law will be counted in the ratio that it bears to the whole period, and the time of the new law will be computed upon the basis of the ratio that the unexpired term under the old law bears to the whole time. Thus, if under the old law two-thirds of the time had expired, then one-third of the new law would be allowed within which to sue": Odum v. Garner, 86 Tex. 374, 25 S. W. 18; Martin v. Kuykendall (Tex. Civ. App.), 26 S. W. 144. The principal case, at page 452, however, declares "that it is a recognized canon of statutory construction that where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal or re-enactment of a portion of it, the re-enactment neutralizes, so far as it goes, the repeal, and the portion continued entitles such part to be regarded as the law during the entire period of both statutes."

MOHR v. WILLIAMS.

[95 Minn. 261, 104 N. W. 12.]

NEW TRIAL on Account of Excessive Damages, Discretion of the Court.—Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or a verdict should be reduced, rests in the sound discretion of the trial court, in the review of which the appellate court will be guided by the general rule applicable to other discretionary orders. (pp. 465, 466.)

PHYSICIANS AND SURGEONS, Consent Necessary to Operation by.—Ordinarily, a patient must be consulted and his consent given before a physician can operate upon him. (p. 467.)

PHYSICIAN AND SURGEON—Consent to Operation, When Implied.—If a person is injured to the extent of unconsciousness, and his injuries are of such a nature as to require prompt surgical attion, a physician is justified in applying such medical or surgical treatment as may be reasonably necessary for the preservation of life or limb, and the consent on the part of the injured person is implied. So, if in the course of an operation to which the patient had consented, a physician should discover conditions not anticipated before the operation was commenced and which, if not remedied, endangered the life or health of the patient, such physician would, though no express consent was given, be justified in extending the operation to remove and overcome them. (p. 468.)

PHYSICIAN AND SURGEON—Consent to Operation, When not Implied.—If a patient consenting to an operation on the right ear is placed under an anesthetic for that purpose, and the operating physician discovers and concludes that the operation upon that ear is not necessary, but that the left ear ought to be operated upon, and thereupon he operates upon it, instead of the right ear, there is no implied consent to the operation, and the patient may recover therefor. (pp. 468, 469.)

PHYSICIAN AND SURGEON — Consent to Operation by Family Physician, When does not Bind Patient.—The fact that the family physician is present when a patient is put under an anesthetic for the purpose of undergoing an operation by another physician, and is then informed by the operating physician that the intended operation is not necessary, but that another and different operation is, and makes no objection thereto, does not establish the implied consent of the patient to the latter operation. Whether, under such circumstances, the operation was consented to is a question of fact for the jury. (p. 469.)

ASSAULT AND BATTERY—Malice or Wrongful Intent.—A physician operating upon a patient while under an anesthetic and without procuring her consent to that operation, though she was placed under an anesthetic for another operation to which she had consented, is guilty of an assault and battery, though the operation was necessary, was skillfully performed, and without any evil intent. (p. 470.)

H. A. Loughran and S. C. Olmstead, for the plaintiff.

Keith, Evans, Thompson & Fairchild and John D. O'Brien, for the defendant.

[264] BROWN, J. Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp [265] in the middle ear, which indicated that some of

the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anesthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—plaintiff's family physician, who attended the operation at her request—who also examined the ear and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon, devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear, removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skillfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor.

The trial in the court below resulted in a verdict for plaintiff for fourteen thousand three hundred and twenty-two dollars and fifty cents. Defendant thereafter moved the court for judgment, notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover, or, if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive, appearing to have been given under the influence of passion and prejudice. The trial court denied the motion for judgment, but granted a new trial on the ground, as stated in the order, that the damages were excessive. Defendant appealed from the order denying the [266] motion for judg-

ment, and plaintiff appealed from the order granting a new trial.

1. It is contended on plaintiff's appeal that the trial court erred in granting a new trial of the action; that the order should be reversed and the verdict reinstated. The new trial was granted, as already stated, on the ground that the verdict was excessive, appearing to have been given under the influence of passion and prejudice; and the point made is that the evidence, as contained in the record, does not sustain this conclusion, within the limits of the rule applicable to motions for a new trial based upon that ground. Considerable confusion has existed with reference to the proper rule guiding this court in reviewing orders of this kind ever since the decision in Nelson v. Village of West Duluth, 55 Minn. 497, 57 N. W. 149, wherein it was said that the rule of Hicks v. Stone, 13 Minn. 398 (434), did not apply. Several decisions involving the same question have since been filed, and the bar is apparently in some doubt as to the true rule upon the subject.

We are not disposed to review the former decisions of the court, but, for future guidance, take this occasion to say (that there may be no further controversy in the matter) that in actions to recover unliquidated damages, such as actions for personal injuries, libel, and slander, and similar actions, where the plaintiff's damages cannot be computed by mathematical calculation, and are not susceptible to proof by opinion evidence, and are within the discretion of the jury, the motion for new trial on the ground of excessive or inadequate damages should be made under the fourth subdivision of section 5398 of the General Statutes of 1894; and in such cases the court will not interfere with the verdict unless the damages awarded appear clearly to be excessive or inadequate, as the case may be, and to have been given under the influence of passion or prejudice. On the other hand, in all actions, whether sounding in tort or contract, where the amount of damages depends upon opinion evidence, as the value of property converted or destroyed, the nature and extent of injuries to person or property, the motion for new trial should be made under the fifth subdivision of the statute referred to; and in cases of doubt, or where both elements of damages are involved, under both subdivisions: State v. Shevlin-Carpenter Co., 66 Minn. 217, 68 N. W. 973.

But in any case, whether a new trial upon the ground of excessive [267] or inadequate damages should be granted or refused, or whether the verdict should be reduced, rests in the sound judicial discretion of the trial court (Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87), in reviewing which this court will be guided by the general rule applicable to other discretionary orders. We applied this rule at the present term in Epstein v. Chicago Great Western Ry. Co., 95 Minn. 516, 104 N. W. 12. Where the damages are susceptible of ascertainment by calculation, and the jury return either an inadequate or excessive amount, it is the duty of the court to grant unconditionally a new trial for the inadequacy of the verdict, or, if excessive, a new trial unless plaintiff will consent to a reduction of the amount given by the jury.

Applying the rule stated to the case at bar, we are clear the trial court did not abuse its discretion in granting defendant's motion for a new trial, and its order on plaintiff's appeal is affirmed. We cannot adopt the suggestion of counsel for plaintiff that this court now reduce the verdict to a proper amount, for there is no verdict upon which such an order could act. It was set aside by the trial court.

2. We come, then, to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons: (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear; (b) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary; (c) That, under the facts disclosed, an action for assault and battery will not lie; it appearing conclusively, as counsel urge, that there is a total lack of evidence showing or tending to show malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary,

then the further questions presented become important. This [268] particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary.

The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him.

It was said in the case of Pratt v. Davis, 37 Chic. L. N. 213, referred to and commented on in 60 Cent. L. J. 452: "Under a free government, at least, the free citizen's first and greatest right which underlies all others—the right to the inviolability of his person; in other words, the right to himself—is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skilled or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anesthetic for that purpose, and operating upon him without his consent or knowledge."

1 Kinkead on Torts, section 375, states the general rule on this subject as follows: "The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between [269] physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the

dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further.

It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them.

But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right [270] which was authorized, but upon an independent examination of that organ, made after the

authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, questions of fact for the jury.

3. The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anesthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

4. The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a [271] matter of law, that no assault and battery was committed, even

though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery.

We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence: 1 Addison on Torts, 689; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Vosburg v. Putney, 80 Wis. 523, 27 Am. St. Rep. 47, 50 N. W. 403, 14 L. R. A. 226.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Orders affirmed.

The Liability of Physicians and Surgeons for negligence and malpractice is the subject of a monographic note to Gillette v. Tucker, 93 Am. St. Rep. 657-669.

WIDING v. PENN MUTUAL LIFE INSURANCE COMPANY.

[95 Minn. 279, 104 N. W. 239.]

TRESPASSERS are Bound to Take the Premises on Which They Go as They are, and the owner is not in duty bound to go beyond the oblgations which arise from actual or implied duties to provide a reasonably safe place for intruders or licensees. (pp. 472, 473.)

APARTMENT HOUSES, Duties of Owners of.—Where a house having several apartments is let to different families, the owner is bound to contemplate all ordinary and reasonable purposes for which the different parts of the house may be used, and if he wishes to restrict the occupancy of the porches by tenants and their children, it is just and reasonable to require him to bring home his restrictions to such persons. (p. 473.)

APARTMENT HOUSE—Liability of Owner to Children Injured While Playing on the Porches.—If a house contains several sets of apartments which are rented and occupied by different families, a child of one of such families playing on a porch of the building, though the apartments occupied by her parents do not adjoin such porch, is not a trespasser, and where the landlord has for several years permitted the children of his tenants to play on the porches of his building, he is liable for injuries suffered by such a child through a defect in such porch of which he had notice. (p. 473.)

Trafford N. Jayne, for the appellant.

Keith, Evans, Thompson & Fairchild, for the respondent.

281 LOVELY, J. The plaintiff, the mother of a female infant child (the father having died), brings this action to recover for injuries sustained by the infant. At the close of the plaintiff's testimony defendant moved for a dismissal, which was granted. A new trial was asked, which was denied. From this order plaintiff appeals.

The evidence reasonably tends to support the following facts: The infant was six and a half years of age at the time of the accident. Her mother rented of defendant an apartment, which was one of numerous suites of flats of a large building fronting on Washington avenue, in Minneapolis. There were two stores on the ground floor. Above the stores were sixteen flats. Plaintiff had one apartment of six rooms on the third floor, fronting on Washington avenue. This was a front suite, which had no porch directly connected. In the rear were similar apartments, to which were attached open porches above the first floor, each porch being one hundred fifty feet in length, five feet in width, two in number, one above the other. There were halls adjacent to the different apart-

ments, and easily accessible to the tenants of the building who occupied the same for household purposes. The usual relation between the different apartments existed, and tenants could go from one to the other without passing into the street. While the plaintiff's rooms were not attached to the rear porch, she was allowed privileges thereon for placing wood and other conveniences usual in household purposes. There was in connection with the suites a janitor, who had taken care of the building and apartments for three years previous to the accident. On the second floor below, in the most distant flat from plaintiff's apartments, her child was playing with a neighboring child on the back porch. Around this porch was a balustrade or railing some three feet in height, which would have afforded a reasonable protection to restrain children thereon from falling had it not become defective some two weeks previous, when the janitor repaired it. The night before the accident it again broke, and the tenant who occupied the rooms, without notice to the janitor, nailed it up. The plaintiff's child, while playing with her associate, ran against the balustrade. It broke by reason of its defective condition, and she was precipitated to the ground, receiving injuries for which her mother, the plaintiff, seeks to recover in this action. It may be further stated that the testimony [282] tended to show that occasionally during a number of years previous to the commencement of the action the children of tenants in the building were in the habit of playing upon the back porches without reference to the occupancy of adjacent apartments by their parents, and also that under the regulations imposed by the owner of these apartments the children were not allowed to use the halls for that purpose.

The theory of the learned trial court in dismissing the action was that plaintiff's child was trespassing upon the porch, or at best a mere licensee; and, conceding that she might have a right to be on the porch where her mother had stored her own articles, she did not have that same privilege on one of the porches of another tenant, but was required to take such premises at her own risk, or as she found them. It is a well-settled principle of law which must be adhered to that trespassers are in duty bound to take the premises upon which they go as they are, and that the owner of the same is not in duty bound to go beyond the obligations which

arise from actual or implied duties to provide a reasonably safe place for intruders or licensees.

We have been cited to several cases which are supposed to be relevant to the questions here involved, but the peculiar situation that existed, in our judgment, must control and affect the liability based upon the particular facts before us, and no cited case is directly applicable.

These apartments were occupied by tenants for domestic purposes. The defendant landlord, who rented and received compensation for their use, was in duty bound to contemplate all ordinary and reasonable purposes for which they might be used; and if, within such limitations, it was intended to restrict the occupancy of the porches by the tenants and their children, it was just and reasonable that such restrictions should be definitely made and brought home to such persons. A number of families living in apartments like these would be reasonably expected to have children of tender years, and it would be difficult to prevent them from using the halls, though it might be done, as in this case, by regulation. It was also but reasonable to suppose that they would go upon the porches, and the fact that they had done so for a number of years without objection from the owner while the building was under the control of defendant's janitor, in connection with the [283] natural and ordinary characteristics of children, has a tendency to establish an implied invitation to use the porches in this way. Defendant had knowledge not only of the fact of the use of the porches by the children of the building, but that the balustrade which was the direct cause of the injury was out of repair. The janitor in fact repaired it a sufficient length of time before the accident to put him upon inquiry that it was defective. The fact that it again got out of repair very soon would have a tendency, under such circumstances, to show that it was defective, and had not been properly repaired; and in permitting the balustrade to remain in a defective condition must be regarded as little less than a trap or hidden source of danger.

Under the evidence in this case, considering the use that was made of the building by the tenants, the natural relations that arise from such use, the habits of the children, their tendency, which cannot be excluded from our inquiry, it seems very clear that it would be a question of fact for

the jury to determine whether the defendant exercised proper care in maintaining the railing in a reasonably safe condition.

We may say with reference to testimony that was offered to show that there were no playgrounds in connection with the building that, while it was not the duty of the defendant to furnish a playground for the children, the natural tendency and inclination of the children, their habits, in connection with the permission it gave to use the porches, would require its surroundings and conditions to be shown, and that for this purpose it was error to exclude this evidence.

The order appealed from is reversed, and new trial granted.

The Liability of the Owner of a Building Who Rents Portions of it to different tenants, reserving the control of halls, stairways, and other portions is also considered and determined in Whitcomb v. Mason, 102 Md. 275, 62 Atl. 749. In that case, however, the plaintiff, who occupied an office in the building, sought to recover because when he undertook to remove his furniture on Sunday, during a fire, he found a door locked, which prevented such removal, and rendered it impossible for him to avoid the destruction of his property. The court held that the landlord was under no obligation to have provided on Sunday the means of egress from the building, and hence was not liable, but the court, nevertheless, stated the general rule of law respecting the landlord's duties as follows:

"Although the liability of the landlord as to the physical condition of the premises covered by the lease is as above stated, the weight of modern authority supports the rule that where he leases separate portions of the same building to different tenants and reserves under his control the halls, stairways and other portions of the building used in common by all of the tenants as means of access to their respective rooms or apartments, he is under an obligation to use reasonable diligence to keep the portions, so retained under his control, of the building in a safe condition and free from improper obstructions: 18 Am. & Eng. Ency. of Law, 2d ed., pp. 220, 221; Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Vanderbeck v. Hendry, 34 N. J. L. 467; Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732, McGinley v. Alliance Trust Co., 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334; Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238, and notes thereto.

"This obligation of the landlord to the tenants of different parts of the same building, in reference to the halls, stairways, doors, etc., of which he has kept possession for their common use, has been held not to result from the implied covenant for quiet enjoyment incident to the leases of the several portions of the building, but to be of the same character as that of any other owner of real estate,

who permits or invites others to use it for a particular purpose, to keep it safe for those using it within the scope of the invitation: Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Vanderbeck v. Hendry, 34 N. J. L. 467; Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 282. Whatever may be the true origin and character of this obligation of the landlord, it ought not to be extended beyond the uses and purposes to which it is reasonable, from the situation and nature of the building containing the demised apartments, to infer that the halls, stairways, etc., were intended to be subjected in making the leases to the respective tenants.

"Now, what were the reasonable uses for which the appellant, as landlord, was under obligation to keep in proper condition the halls, stairways and outer doors of the building containing the office leased by him to the appellee? It appears from the evidence that it was an office building located in the business portion of the city opposite the courthouse. With the exception of a lunchroom and restaurant on the ground floor, the entire building was rented out as offices, mainly to lawyers. The reasonable use of the outer doors, halls and stairways of such a building so located, so far, at least, as related to the lawyers' offices, required that they should be kept open and free from improper obstruction during such hours of the day and evening as their tenants and persons having business with them might reasonably be expected to desire access to the offices. But such use did not require that the doors, halls, etc., should be kept in that condition throughout the entire night nor on Sunday, which is a dies non, when secular avocations are presumed to be suspended. It certainly did not require the outer doors of the building to be kept open on Sunday to such an extent as to admit of the removal by the tenants of large pieces of furniture. The access afforded to the building on Sunday, as shown by the evidence, through the open door and hallway on the ground floor, which connected with the stairway, was, in our opinion, reasonable and adequate for all ordinary occasions. The occurrence of the great fire of February 7, 1904, which destroyed the entire center of the city, was a sudden and unexpected calamity. Even then, at 3 o'clock in the afternoon, when the appellee first went to his office, he did not regard the danger of its destruction as serious, for he merely took from it his insurance policies and made no effort to remove its other contents until an hour and a half later. There is no evidence that the landlord or his agent were on the premises at the time when the appellee alleges that the second-story front door was locked, or were aware that the destruction of the building was so seriously threatened by the fire that any of the tenants desired to remove their furniture. Under these circumstances we are of opinion that the appellant, as owner and landlord of the building, discharged his obligation in reference to access to it on Sunday by having the door and hallway on the ground floor open and unobstructed."

The general law upon this subject is also considered in the opinion in Siggins v. McGill, 72 N. J. L. 263, post, p. 666, 62 Atl. 412, and in the monographic note to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 499-559, on the liability to third persons of lessors of real property.

HUITINK v. THOMPSON.

[95 Minn. 392, 104 N. W. 237.]

MORTGAGE.—The Assignment of a Mortgage is a Conveyance within the meaning of a statute providing that every conveyance by mortgage, deed, or otherwise, of real estate shall be recorded in the office of the register of deeds, and if not so recorded, shall be void as against any purchaser in good faith and for a valuable consideration. (p. 477.)

MORTGAGE, UNRECORDED, Assignment of, Effect of as Against Purchaser Under Foreclosure by the Assignor.—If a mortgagee assigns the mortgage, and nevertheless subsequently proceeds to foreclose it, and at the foreclosure sale the property is purchased by one having no notice of such assignment, it not being filed for record, he acquires a title to the property, as against the assignee. (p. 478.)

William H. Hallam and Connell & Weidner, for the appellant.

O. E. Holman, for the respondents.

393 BROWN, J. The facts in this case are as follows: On March 6, 1900, defendants Thompson were the owners of the real estate involved in this action, and mortgaged the same to one Casper Ernst to secure the payment of a promissory note for the sum of six hundred and seventy-five dollars. The mortgage was in all things duly executed, and properly recorded in the office of the register of deeds upon March 7, 1900. On March 10, 1900, Ernst sold and transferred the promissory note, secured by the mortgage, to the plaintiff in this action by a written indorsement on the back of the note, which by its terms assigned to plaintiff both the note and mortgage. There was no formal written assignment of the mortgage. The note was at the time of the transaction delivered to plaintiff, who at all times thereafter retained the same, together with the mortgage securing it; but the assignment thereof was not recorded, or other notice thereof given. On October 3, 1901, the mortgage, still standing of record in the name of Ernst, was foreclosed by advertisement,

such foreclosure being caused and conducted by Ernst, and in his name, as mortgagee. The notice of sale contained a statement that the mortgagor had failed to pay the interest as it matured, in consequence of which default foreclosure was made. The premises covered by the mortgage were, on November 27, 1901, struck off by the sheriff to Ernst, he being the only bidder at the sale, and the usual certificate was issued to him, which he thereafter, on December 5, 1901, caused to be recorded in the office of the register of deeds. On March 24, 1903, the time of redemption from the foreclosure having expired, Ernst and wife conveyed the mortgaged premises to defendant Brigham by warranty deed. This deed was duly recorded on April 6, 1903. Brigham paid Ernst a full and valuable consideration for the property, and had no notice, knowledge, or information of any claim on the part of plaintiff to the mortgage [394] so foreclosed by Ernst. In part payment of the purchase price, Brigham executed and delivered to Ernst a mortgage upon the premises for the sum of six hundred and fifty dollars. This mortgage was recorded on April 6, 1903. Soon after the execution and delivery of this mortgage, Ernst sold and assigned the same to defendant Gores, and a formal written assignment thereof was recorded on October 31, 1903. Gores paid Ernst the face value of this mortgage.

Plaintiff subsequently brought this action to set aside the foreclosure of the mortgage so assigned to him by Ernst, the subsequent deeds, the Brigham mortgage, and the assignment thereof to defendant Gores, and for the foreclosure of the mortgage assigned to him. Upon the facts as above stated, the trial court ordered judgment for defendants, from which plaintiff appealed.

We are of opinion that the trial court correctly disposed of the case. The mortgage assigned to plaintiff was of record, and conveyed information to parties dealing in the land that Ernst was the mortgagee and its owner. The assignment of that mortgage to plaintiff was not recorded, and no notice was ever given to or received by any of the defendants until after their rights, based upon the foreclosure thereof, had accrued. Defendants had the right to rely upon the records and the state of the title as there disclosed, and are protected by the statute providing for the recording of deeds, mortgages, and other instruments affecting title to real estate. Our statutes provide (Gen. Stats. 1894, sec. 4180) that every conveyance

by mortgage, deed, or otherwise of any real estate shall be recorded in the office of the register of deeds, and that every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration. An assignment of a mortgage is a conveyance within the meaning of the statute: Fairfax's Admr. v. Lewis, 11 Leigh (Va.), 233; Vanderkemp v. Shelton, 11 Paige, 28; Decker v. Boice, 83 N. Y. 215; Westbrook v. Gleason, 79 N. Y. 23; 3 Pomeroy's Equity Jurisprudence, sec. 1209; Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368, 46 N. E. 426; Butler v. Bank of Mazeppa, 94 Wis. 351, 68 N. W. 998; 24 Am. & Eng. Ency. of Law, 2d ed., 82.

Ernst foreclosed the mortgage he had assigned to plaintiff, the period of redemption expired, and defendant Brigham had the undoubted right to rely upon the record title; and it conclusively appears that he was [395] a purchaser in good faith, and for a valuable consideration, without notice of any right possessed by plaintiff.

In the case of Merchant v. Woods, 27 Minn. 396, 7 N. W. 826, it appeared that mortgage upon real property had been paid, but was allowed to remain undischarged of record, and was subsequently foreclosed by advertisement, and the property sold to a purchaser without notice of the prior payment. It was held that he acquired a valid title as against the mortgagor. The court in that case said, in substance, that the statutory provisions relating to the recording of conveyances of real property were especially designed for the benefit and protection of parties dealing in that kind of property; that the real object was to provide reliable information respecting titles, easily accessible to all, and upon which anyone might safely act in making a purchase of one appearing to be the owner. Bausman v. Eads, 46 Minn, 148, 24 Am. St. Rep. 201, 48 N. W. 769, lays down a similar rule. See, also, Burke v. Backus, 51 Minn. 174, 53 N. W. 458.

The cases cited by counsel for plaintiff are not in point. It is true that, to authorize the foreclosure of a real estate mortgage, the person foreclosing the same must be the legal owner of the instrument; the ownership and the right to foreclose must concur in the party foreclosing. But that rule can have no application to this case. Plaintiff, by his failure to record his assignment, clothed Ernst with the indicia of title to the mortgage and the apparent right to foreclose the same, and cannot now be heard to assert his rights as against inno-

cent third parties, who acted upon facts disclosed by the record as permitted to exist by plaintiff, and in entire good faith. The rule that only the legal owner of a mortgage can foreclose it is but the application of the general principle that the legal title to property can be conveyed and transferred only by the true owner. But if the owner of the fee fails to record the evidence of his title, and the immediately preceding owner, whose title is of record, conveys the same, the recording act will protect the title so transferred, the grantee being a purchaser in good faith for a valuable consideration.

For these reasons, our conclusion is in harmony with that reached by the learned trial court, and the judgment appealed from is affirmed.

A Mortgage is a Conveyance within the meaning of the recording laws of Montana: Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598. And the assignment of a mortgage is a conveyance within the meaning of the statutes of Massachusetts, and therefore must be recorded, to charge subsequent purchasers with notice: Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368.

LAMM v. ARMSTRONG.

[95 Minn. 434, 104 N. W. 304.]

VENDOR AND PURCHASER, Respective Rights of.—Under an executory contract for the sale and purchase of land the vendor continues, in the strict legal sense, the owner until the purchase price is paid, the vendee holding the equitable title, and the legal title remaining in the vendor as security. (p. 481.)

VENDOR AND PURCHASER, Effect of the Assignment by the Vendor of His Contract of Sale.—If, after a contract in writing has been made for the purchase and sale of real property, the vendor assigns such contract as security for indebtedness due from him to the assignee, the assignment amounts to a transfer of the vendor's lien on the land, and cannot be impaired by the subsequent termination of the contract by the vendor and vendee without the knowledge or consent of the assignee. (p. 482.)

J. L. Lobben, for the appellants.

A. E. Clark, for the respondent.

435 BROWN, J. This action was brought to enforce rights acquired through an assignment by the vendor of an executory contract for the sale of certain real property; to have the assignment, to the extent of the unpaid purchase price at the time it was made, declared a lien upon the vendor's interest

in the property, and to foreclose the same. Plaintiff had judgment below, and defendants appealed.

The facts are as follows: On June 14, 1898, Moses K. Armstrong owned an undivided two-thirds of certain land located in Watonwan county, and on that day entered into an executory contract in the usual form to sell and convey the same to one Stemper for a consideration of seven thousand seven hundred dollars. Armstrong's wife did not join in the contract. On October 7, 1898, Armstrong, being indebted to one Stephen Lamm, plaintiff's testate, assigned this contract to him as security for its payment. The assignment was indorsed on the back of the contract in the following language: "For value received I hereby assign, sell and set over unto S. Lamm, all my right, title and interest in and to the land described in the within contract."

This was signed by Armstrong and his wife. At the time the contract was so assigned there was due thereon from the vendee the sum of seven thousand six hundred dollars. Thereafter, and without the knowledge or consent of Lamm, the contract was terminated by mutual agreement between Armstrong and Stemper, and the latter abandoned the property. The original contract was during all this time in the possession of Lamm, but was never recorded in the office of the register of deeds, or other notice given that it had been assigned to him. On November 24, 1903, Armstrong was adjudged a bankrupt, and defendants Seager, Torson and Olson were appointed his trustees, and were made defendants in this action in their capacity as such. The indebtedness due from Armstrong to Lamm has never been paid or discharged, and exceeded, according to the findings of the trial court, the amount due from Stemper on the contract. The trial court held on these facts that the assignment, in effect, vested in Lamm a lien upon the land to the extent of the indebtedness due on the contract, with interest, and judgment was ordered declaring plaintiff, as executor of the estate of Lamm, [436] entitled to enforce payment of the same as in the case of a foreclosure of a mortgage or other lien upon real property.

But one question is presented for consideration. The question of preference under the bankruptcy act, urged by defendants, trustees of Armstrong, was not made an issue by the pleadings, and therefore not involved in the case. The point that the court below erred in denying defendants' application to amend their answer by setting up that the assignment

of the contract was such a preference, and hence void, is not well taken. This defense was not made by the original answer, and the application to amend was not made until after the trial of the action and a formal decision therein had been filed. It was clearly discretionary with the trial court whether to permit the amendment at so late a date.

The principal question in the case is with respect to the rights created by the assignment of the land contract from Armstrong to Lamm. It is contended on the part of plaintiff that in law and equity the transaction was, in effect, a mortgage; and that the land became thereby pledged as security for the payment of the debt intended to be secured. While it is contended on the part of defendants, trustees of the estate of Armstrong, that at most Lamm became substituted to the rights of Armstrong with authority to enforce the contract for the sale of the land to the same extent that Armstrong might have done, had not assignment been made, with no other or greater rights. The question is controlled by well-settled equitable principles. The intention of the parties must prevail, and they are presumed to have intended the natural and legal consequences of their acts. The assignment was made as security for the payment of money due from Armstrong to Lamm, and to provide him means for enforcing payment in case of the default of Armstrong to pay the same. To be effective for that purpose, something more than a mere substitution to the position of Armstrong was necessary. If that was the only effect of such a transaction, the assignment would be of doubtful force. The remedy of the assignee in such case on failure of performance by the vendee would be the cancellation of the contract, resulting in a restoration of the title to the vendor unencumbered by the contract or its assignment, and a complete extinguishment of the security. The contract in the case at bar was in fact canceled by agreement between Armstrong and Stemper without the [437] knowledge or consent of Lamm, and, unless by the transaction Lamm acquired a lien of some kind upon the land, the assignment was thereby rendered inoperative and valueless for the purpose intended.

It is elementary, in cases of executory contracts of this nature, that the vendor continues in a strict legal sense the owner of the land until the purchase price is paid; the vendee holding only the equitable title, the legal title remaining in the vendor as security: Minneapolis etc. Ry. Co. v. Wilson,

25 Minn. 382; Berryhill v. Potter, 42 Minn. 279, 44 N. W. 251. With the legal title in the vendor, he would have the clear right to mortgage the property, either by an assignment of the contract of sale or directly by execution of a formal instrument for that purpose. Either of which would, of course, be subject to all the rights of the vendee. It is certain that the parties to this transaction had in mind adequate security for the payment of the indebtedness to Lamm, and the result of their action must be held to effectuate their intent, to have created the relation of mortgagor and mortgagee between them: 11 Am. & Eng. Ency. of Law, 2d ed., 129, and cases cited. The assignment was, in effect, a transfer to the assignee of the assignor's lien for the purchase price of the land. The fact that Armstrong subsequently canceled the contract by an agreement with the vendee does not affect the rights of Lamm.

The precise question came before the supreme court of Texas in Russell v. Kirkbride, 62 Tex. 455, where it is said: "A vendor, however, may defeat his right to annul such a contract, to the prejudice of another, to whom he has transferred notes given to secure the purchase money, for they carry with them the lien which the vendor had, and he could not be permitted, without wrong to such holder, to destroy the security which may constitute the sole or chief value of the note or notes transferred; and if, as between the vendor and vendee, such a contract be rescinded without the consent of the holder of notes, which have been transferred, then it certainly would be true that the lien would still continue as against the vendor for the protection of the holder of such notes, and it would also continue against the land in the hands of a subsequent vendee, who should buy it with notice of the lien on the land existing while the land was in the hands of his vendor or of the first vendee."

[438] By the cancellation Armstrong deprived Lamm of a remedy against the vendee, but he could not thus deprive him of his remedy against the land: Young v. Atkins, 51 Tenn. 529; Cummings v. Oglesby, 50 Miss. 153; Church v. Smith, 39 Wis. 492; Lowery v. Peterson, 75 Ala. 109. The rule of the cases cited fully supports the decision of the trial court, and is in harmony with the general rules of equity applicable to transactions of this and like nature.

We have examined the record with reference to the contention of defendants that the amount awarded to plaintiff

was in excess of the amount actually due, and conclude that the findings of the court in this respect are fully sustained. It appears that Armstrong was indebted to Lamm at the time of the assignment in the sum of six thousand dollars, and the testimony is that the assignment was intended as security for that amount and such other amounts as Lamm might thereafter advance to Armstrong. A mortgage for future advances is valid.

Judgment affirmed.

The Effect of Giving a Bond for a Title, upon the sale of land, is to vest in the vendee the equitable title, the legal title remaining in the vendor as security for the purchase money: Robertson v. Read, 52 Ark. 381, 20 Am. St. Rep. 188. As to the assignability of a vendor's lien, see Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; National Bank v. Lock, 17 Wash. 528, 61 Am. St. Rep. 923; Allen v. Caylor, 120 Ala. 251, 74 Am. St. Rep. 31.

MATTSON v. MINNESOTA AND NORTH WISCONSIN RAILROAD COMPANY.

[95 Minn. 477, 104 N. W. 443.]

TRESPASSING CHILDREN, Landlord's Liability for Injuries Suffered by.—One who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon after knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom, even though a trespasser. (p. 486.)

EXPLOSIVES, Care to be Exercised With.—The degree of care required of persons having the possession and control of dangerous explosives, such as dynamite, is of the highest. The utmost caution must be used to the end that harm may not come to others in coming in contact with them. (p. 487.)

TRESPASSSING CHILDREN, Liability for Injuries to by Dynamite.—One who keeps or leaves dynamite on his premises, where children have, to his knowledge or that of his servants, been in the habit of loitering and amusing themselves, is liable for damages to them due to their taking possession of the dynamite and being injured by its explosion. (pp. 488, 491.)

NEGLIGENCE OF PARENT—Imputing to His Child.—The contributory negligence of his father is not imputable to a child non sui juris, and the latter may recover for injuries due to the negligence of another, although the father of the child was guilty of contributory negligence. (pp. 493, 494.)

Davis & Hollister, for the appellant.

John Jenswold, Jr., for the respondent.

[478] BROWN, J. This action was brought under the provisions of section 5164 of the General Statutes of 1894, to recover for injuries to plaintiff's minor son, caused, as alleged in the complaint, by the negligence of defendant. Plaintiff had a verdict in the court below, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

It appears without dispute that plaintiff's two sons—Hjalmar, for whose benefit this action is prosecuted, and a younger brother—both under the age of nine years, obtained from some source a stick of dynamite, which they exploded, instantly killing the younger of the two, and permanently maiming and injuring Hjalmar. Two principal questions of fact were presented for the consideration of the jury, viz.: 1. Whether the dynamite resulting in the injury complained of was obtained from the premises of defendant; and 2. If so, whether [479] defendant was guilty of negligence in permitting it to remain on or about its premises unguarded and unprotected. It was claimed by plaintiff that the dynamite was obtained from defendant's premises, and that defendant was guilty of actionable negligence in permitting it to remain in an exposed place thereon. This was controverted by defendant, and it is urged in this court that the evidence is wholly insufficient to justify the verdict of the jury upon either question.

The evidence tends to show that, some time prior to the date of the occurrence complained of, defendant was engaged in constructing a roadbed in the vicinity of the farm owned and occupied by plaintiff and his family, and that in and about this work it used dynamite in removing stumps of trees and blasting rock. It had finished its work in this particular, and the employés engaged therein had gone elsewhere; but all the dynamite belonging to defendant, which had been taken to this place for use, was not removed at the time the work was completed, at least the evidence is sufficient to justify the jury in so finding. The evidence shows that one box of dynamite was deposited under a pile of ties near the railroad track, and another was discovered, by plaintiff's boys and a neighbor's boy of about their age, under an old mattress, which had evidently been used by defendant's employés during the time they were engaged in the work in that locality. The explosion, which resulted in the death of one of the boys and the injury of the other, occurred not far from the railroad right

of way, and near at hand was found on the day following a pile of about sixteen sticks of dynamite laid up against the stump of a tree. Just how this came there the evidence does not disclose. It was not upon defendant's premises, but about three hundred feet therefrom. Considerable blasting was done by defendant's employés which was naturally attractive to the boys of the neighborhood, and they were to some extent loitering about the railroad right of way while the work was in progress. They had been warned away by the railroad employés, and plaintiff, their father, had been told to keep them away from the railroad work. On the day prior to the accident the boys discovered the box of dynamite under the mattress, and called the attention of one Nester, who was in the employ of defendant, to the fact. Nester took the box, opened it in the presence of the boys, and, upon discovering that it contained dynamite, stated that he would take it down by the railroad track, a [480] short distance away, and remove it when he quit work at night. The boys asked him for some of the dynamite, but he refused, saying it was a dangerous article to handle and that they must let it alone. They followed him to the railroad track and saw him place it under the ties, where it was claimed the other box was stored, and he must have known of their presence and that they knew where he placed it. The ties were piled along the side and at right angles with the track, projecting over the embankment, leaving a space underneath the outer ends and the receding bank, in which the dynamite was placed. The boys lingered at the pile of ties until after Nester had returned to his work, when they went to the box, removed the cover, it not being nailed down, and took out a stick of dynamite and carried it home with them. On their arrival home, the father discovered the dynamite, took it from them, and concealed it in his barn. The day following the boys obtained dynamite from some source, as already stated, and its explosion resulted disastrously to them.

We have considered the evidence with care, and are satisfied that the jury was fully justified in finding that the boys obtained the dynamite from the premises of the railway company; at least, the evidence is not so clearly or conclusively the other way as to justify the court in disagreeing with the jury. While there was evidence that dynamite had previously been used, not only by the railway company, but by plaintiff and other farmers in the vicinity, as an agency in remov-

ing stumps in clearing land, the fair inference from all the facts shown, which the jury had the right to draw, points to the fact that the dynamite which did the damage complained of belonged to defendant. Plaintiff testified that he had no dynamite at his home at this time. It appeared on the trial, however, that sixty or seventy sticks were found in one of his buildings under a barrel the day following the accident; but how this came there was not made clear by the evidence, and it was for the jury to say whether the boys took from that source, conceding that it was there on the day of the accident, or from defendant's supply at the pile of ties. The evidence is conclusive that they knew of the location of the company's dynamite (they were present when Nester placed the box under the tie pile), but it does not appear that they knew of that in the building owned by plaintiff. Plaintiff was not at home on the day in question, and if the boys were looking [481] for dynamite for the purpose of pleasure and amusement, and knew that it was within their reach at home, they naturally would not have been searching defendant's premises for it. Upon the whole record, therefore, we conclude that the verdict to the effect that the dynamite was taken from the premises of defendant is sustained. It remains to consider whether the evidence makes a case of actionable negligence against defendant respecting the care and custody of its dynamite, and we pass to that question without further discussion of the evidence upon this feature of the case.

Plaintiff relies for recovery upon the doctrine of the "turntable cases," while it is strenuously contended by defendant's counsel that the facts do not bring the case within that principle of law, that it conclusively appears that defendant took reasonable care of its dynamite, and that, conceding for the purposes of argument that the dynamite resulting in the injury to the boys was taken from its premises, they were trespassers thereon, and no recovery can be had in this action.

The rule governing cases of this kind, stated in substance, is that one who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom, even though a trespasser. The rule is intended for the protection of children of ten-

der years, who from immaturity are incapable of exercising a proper degree of care for their own protection. It was first applied in this state in the case of Keffe v. Milwaukee etc. Ry. Co., 21 Minn. 207, 18 Am. Rep. 393, where it was said that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to it for purposes of play is bound to exercise reasonable care for the protection of such children. That case has been followed, and the principle therein laid down applied, in several subsequent cases in this court, and by the courts of last resort in other states; and though in Twist v. Winons ets. R. R. Co., 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, it was said that the rule should not be extended, it has been steadily adhered to in substance in all cases where the facts made it applicable.

[482] It is urged by defendant that the doctrine does not apply to the case at bar. In this we cannot concur. The dangerous instrumentality here involved (dynamite) is an extremely hazardous article in the hands of mature persons, and a hundred-fold more so in the hands of young children. The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article (Keasbey on Electric Wires, 2d ed., 269, 270), and is greater and more exacting as respects young children. As to such, the care required to be exercised is measured by the maturity and capacity of the child: Railroad Co. v. Stout, 17 Wall. 657. What would constitute reasonable care with respect to adults might be gross negligence as applied to a young child: 7 Am. & Eng. Ency of Law, 2d ed., 441, and cases cited. The case at bar, within these rules, is even stronger than the so-called "turntable cases."

There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced therefrom the greater the attraction. As compared with an ordinary turntable, dynamite is vastly more attractive, and far more dangerous. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them

into experiments with it whenever it comes within their reach. In view of these considerations, the rule of law imposed upon him who possesses such dangerous articles should be more exacting than in the case of a turntable; and, applying the rule to the facts before us, it is clear that the jury was justified in finding negligence upon the part of defendant. It failed to take proper care of dynamite brought into this vicinity, and left it exposed upon the premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves.

An examination of the books discloses cases somewhat similar to that at bar. In Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, it appeared that defendant kept on his premises, over which the injured person, a boy of tender years, was in the habit of passing, in an exposed place, certain dangerous explosives. The boy discovered the same, took one [483] of them, and exploded it, with serious injury to his person. An action for injuries to the boy, based on the ground that the defendant was guilty of negligence in leaving the explosives upon his premises in an unguarded and unconcealed place, was sustained. In the course of the opinion in that case Judge Cooley made use of language so pertinent to the facts of this case that we quote it. He said: "The moving about of the children upon the land, where they were at liberty to go, while they were not actually employed, was as much an incident to their being there as is the loitering or playing by children outside the traveled part of the highway as they go upon it to school or upon errands. Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken. In this case a shed in which a dangerous explosive was stored was left only partly inclosed, and its structure and location were such as naturally to invite the entrance of children, either for play or for shelter from sun and rain. Children were rightfully near it; there was nothing in its appearance to warn them off; it was not fastened

against their entrance, and there was nothing about it to indicate that they would do injury or be injured by going there. The box containing the explosives seems to have had more the appearance of a box discarded as of no value, and with worthless refuse in it, than of a box which it was of the very highest importance should be guarded with sedulous care. It was never firmly fastened, and the only warning upon it was the word written upon a top board, which was not always kept on. A man of ordinary prudence, if told that so dangerous an article was so carelessly stored, might well have deemed the statement incredible. We cannot, under these circumstances, say that the plaintiff's father was chargeable with fault in not suspecting the danger and warning his children away from it, or that the child himself was blameworthy in acting upon his childish instincts and propensities, which combined with the negligence of defendant's servant to bring the danger upon him."

484 In Nelson v. McLellan, 31 Wash. 208, 96 Am. St. Rep. 902, 60 L. R. A. 793, 71 Pac. 747, it appeared that defendant placed several sticks of dynamite in a box upon a vacant lot in the vicinity where he was engaged in a public improvement under contract with the municipal authorities, and where boys were in the habit of playing, without securely covering the same, and he was held liable for injuries to plaintiff, a boy of tender years, who found the same and exploded one of the sticks.

In the case of Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38 L. ed. 434, it appeared that the railway company had been operating a coal mine near one of its stations, and was in the habit of depositing the slack upon an open lot between the mine and the station in such quantities that it took fire from the spontaneous combustion and remained in that condition, constantly burning. Plaintiff, a young boy, visited the coal mine in company with another boy, and became frightened by threats of other boys who preceded them to the mine, and in an effort to escape from them fell into the burning slack and was severely injured. The company was held guilty of negligence in not properly guarding the pit of slack, and that, under the circumstances disclosed, the plaintiff was not a trespasser. It appeared that people in general visited the mine at pleasure, including boys of the age of plaintiff. There was nothing

particularly attractive about the mine, either to adults or children, and certainly nothing attractive in the burning pit of slack.

The court in that case cited and commented favorably upon the leading English case of Lynch v. Nurdlin, 1 Q. B. 29. In that case it appeared that defendant's servant left the horse and cart he was driving for his master unhitched in the street and unattended, while he entered a house on some business errand. Plaintiff, a boy of seven years, and other children, discovering the horse unhitched, began playing about the cart. Some of the boys got into the cart, while another led the horse down the street. Plaintiff, in attempting to get out of the cart, fell between the wheels, the cart passing over and breaking one of his legs. Defendant, the master, was held liable for the neglect of its servant in leaving the horse in the manner stated, and that his responsibility was not overcome by the fact that the boys were trespassers. That is an extreme case, and has not been followed to its full [485] extent by the courts of this country. It is only referred to as illustrating the strictness of the rule in this class of cases.

In Euting v. Chicago, 116 Wis. 13, 96 Am. St. Rep. 936, 92 N. W. 358, 60 L. R. A. 158, it appeared that an employé of defendant placed a torpedo upon the track, and ran his engine over it and exploded it, injuring a boy who was standing near. The act was not in the discharge of the fireman's duties, but on the contrary, outside his employment, being an attempt to assist at a Fourth of July celebration then in progress at the place. The company was held liable.

In Pittsburgh etc. Ry. Co. v. Shields, 47 Ohio St. 387, 21 Am. St. Rep. 840, 24 N. E. 658, 8 L. R. A. 464, it appeared that the conductor of a freight train, in a spirit of jollity and mirth, and to have some sport with certain lady passengers on his train, with whom he was acquainted, placed a torpedo in front of the caboose at a point on the road where people were in the habit of passing frequently, expecting that when the car passed over it an explosion would occur and frighten them. No explosion occurred, however, and later in the day the torpedo was found by some boys, who exploded it, injuring plaintiff. The company was held liable, and stress was laid in the opinion on the fact that the railway company had not exercised proper care respecting the custody of the torpedo, and the point that the act of the con-

ductor in placing the torpedo on the track was not in the line of his duties was held not well taken.

In Edgington v. Burlington etc. Ry Co., 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561, will be found an elaborate view of all the leading cases on this subject. That was a "turntable case"; but the rules and principles of law applicable to the protection of children from dangerous instrumentalities on the premises of another are carefully reviewed and considered.

The case at bar is wholly unlike Stendal v. Boyd, 73 Minn. 53, 72 Am. St. Rep. 597, 75 N. W. 735, 42 L. R. A. 288, a case where it was sought to hold the owners of the premises liable for the death of a boy who was drowned in an artificial pond located thereon. Unlike dynamite, there is nothing intrinsically dangerous about an ordinary pond of water, natural or artificial, and the court there very properly held that the doctrine of the "turntable cases" did not apply.

Nor is the case at bar like Haesley v. Winona etc. R. Co., 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023. In that case cars were left by servants of the railroad company in one of its yards, and plaintiff and other boys [486] released the brakes, and the cars ran down a grade, resulting in the injury of plaintiff. It was held that the company was not liable, and that it performed its full duty by setting the brakes on the cars, which the evidence disclosed was done. Whether defendant in the case at bar performed its full duty in the matter of caring for the dynamite injuring plaintiff was a question of fact for the jury. The other Minnesota cases cited and relied upon by appellant, where the doctrine of the "turntable cases" has been held not applicable, are clearly distinguishable. It is unnecessary to extend this opinion by making special reference to each.

In view of the authorities cited and the principles laid down by them, we have no difficulty in holding that the doctrine of the "turntable cases" applies to the case at bar, and that defendant is liable. That defendant's employés left exposed upon its premises a large quantity of the dynamite is clear; and whether it was responsible for the act of Nester in failing to properly guard and conceal the quantity known by him to have been found by the boys, is not of controlling importance. The fact remains that those who were intrusted with its custody, the employés engaged in the work

in which it was used, failed to exercise due care respecting it, with the knowledge that children were in the habit of loitering about the railroad premises; and within the principle of the cases cited defendant is responsible for this neglect.

It is also urged that plaintiff, the injured boy's father, was guilty of contributory negligence; that he knew that his boys had been frequenting the railroad premises, had obtained dynamite therefrom, and wholly neglected to take adequate steps to keep them away, and failed to inform defendant that they had obtained dynamite therefrom; hence, that he was guilty of such negligence as will bar recovery in this action, brought for the benefit of the injured boy. It may be conceded that plaintiff was guilty of contributory negligence, as contended by defendant; but as his negligence can defeat a recovery only by imputing it to the injured son, as held in Fitzgerald v. St. Paul etc. Ry. Co., 29 Minn. 336, 43 Am. Rep. 212, 13 N. W. 168, we take this occasion, the question being squarely presented by the facts, to reconsider the rule announced in that case.

It was there held that the negligence of a parent having the care of an infant non sui juris, which contributes with the negligence of a third [487] person to produce injury to the child, bars recovery by the latter. The decision was by a majority of the court, and was based upon what was regarded sounded principle. There has been much discussion of this question by text-writers and judges, and the courts have not agreed thereon. A number of the states have adopted the reasoning of the leading New York case of Hartfield v. Roper, 21 Wend. 614, 34 Am. Dec. 273, and held to the doctrine as announced by this court in the Fitzgerald case; while other states, following the lead of the supreme court of Vermont in Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67, utterly repudiate the doctrine as unsound in principle and at variance with the general rules of law applicable to the rights of infants. It is said in 4 Current Law, 778, that by weight of modern authority, negligence of a parent or custodian is not imputable to a child non sui juris, so as to bar an action brought on its behalf, and the authorities in support of the statement are there cited.

Bishop, in his work on Noncontract Law (section 582), says that the doctrine of imputed negligence, whereby an infant loses his suit, "not only where he is negligent himself, but

where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested." The law, says the writer, never took a child's property because his father was poor or shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But by this doctrine, "after a child has suffered damages, which, confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother or mother's maid happens to be the one making a contribution." The writer concludes that the "law's established reasons" do not to any extent sustain the doctrine.

The rule is criticised and declared obnoxious to sound principles by Beach in his work on Contributory Negligence, third edition, section 127 et seq., and by Judge Jaggard in his work on Torts: 2 Jaggard on Torts, 985. These criticisms are sustained by a vast majority of the courts, state and federal. The authorities will be found cited in the works referred to and in 7 American and English Encyclopedia of Law, second edition, 448 et seq. See, also, Berry v. Lake Erie etc. R. Co. (C. C.), 70 Fed. 679; Battishill v. Humphreys, [488] 64 Mich. 514, 38 N. W. 581, and Westbrook v. Mobile etc. R. Co., 66 Miss. 560, 14 Am. St. Rep. 587, 6 South. 321, where the subject is ably discussed and the authorities reviewed.

We have given the matter very serious consideration, with the result that in our opinion the doctrine of the Fitzgerald case is unsound, at variance with elementary principles of the law respecting the rights of infants, and should be overruled. The right of an infant to damages for injuries to his person caused by the wrongful act of others is a property right, and entitled to the same protection in the courts as is accorded other property held or owned by him. He is entitled to the protection of the law equally with persons who have attained their majority, and to refuse him relief on the ground of his parents' indifference or negligence would be to deny it to him. To impute to him negligence of others is harsh in the extreme, whether the negligence so imputed be that of his parents, their servants, or his guardian. He is a citizen within the meaning of the law of the land, and en-

titled to such rights and privileges as are appropriate to his class, and to the equal protection of the law. Though the Fitzgerald case has remained undisturbed many years as the law of this state, the rule there laid down is not a rule of property, no rights will be affected by a departure from it, for no one has a vested right to negligently cause injury to another, and we have no misgiving as to the consequences in setting the court right on this important question, and placing it in line with the weight of modern thought. If it had become a rule of property, we would not disturb it; but not being such, and being clearly wrong in principle and contrary to sound policy, it should not be longer adhered to: Ganser v. Ganser, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18.

The other assignments of error require no extended mention. The evidence tending to show that defendant permitted black powder and other explosive matters to remain around and about its premises in the vicinity in question was proper upon the question of the degree of care actually exercised by its servants respecting the custody, care and control of the dynamite. The point made that the court erred in refusing the sixteenth request, to the effect that, if the jury were unable to determine from the evidence whether the boys obtained the dynamite from the premises of the railway company or from plaintiff's premises, [489] plaintiff could not recover, is not well taken. The court fully covered this request in its general charge.

Nor was there any error in the instructions of the court upon the question of damages. It is urged in this connection that under the charge of the court the jury was permitted to award plaintiff damages for the loss of services of his son; but a careful reading of the instructions does not sustain this view. If counsel were apprehensive that the jury might gain that impression from the charge, it was their duty to call the attention of the court to the matter, that the error, if any was made, could be corrected. It is clear that the court did not intend to so charge the jury. The rule of Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754, applies. The damages awarded by the jury are quite large, but the same amount was sustained by the supreme court of the United States in the case of Union Pacific Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38 L. ed. 434.

The question of the contributory negligence of the boys was one of fact, and we would not be justified, on the facts disclosed, in overruling the conclusion reached by the jury on that subject.

Order affirmed.

The Liability to Third Persons of Lessors of real or personal property is the subject of a monographic note to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 499-559.

The Liability of Property Owners to Trespassing Children is discussed in the monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 416-426. The placing of dynamite on a vacant lot, insufficiently covered and in such a position as to be readily discovered and easily tampered with by, and to form an object of attraction to, children accustomed to play upon or pass over the lot, is negligence which may cause responsibility for injury to such children from such explosive: Nelson v. McClellan, 31 Wash. 208, 96 Am. St. Rep. 902. As to the liability of a railway company to a child who intermeddles with torpedoes along its track, see Harriman v. Pittsburgh etc. Ry. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507; Carter v. Columbia etc. R. R. Co., 19 S. C. 20, 45 Am. Rep. 754; Hughes v. Boston etc. R. R., 71 N. H. 279, 93 Am. St. Rep. 518.

The Doctrine of Imputed Negligence is the subject of a recent monographic note to Hampel v. Detroit etc. R. R. Co., 110 Am. St. Rep. 278-298.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

RUSSELL v. SHARP.

[192 Mo. 270, 91 S. W. 134.]

LAW—Whether Inflexible.—**A Law,** however wise and just in its general application, is not of such an inflexible character that it will always be applied regardless of circumstances. (p. 504.)

STATUTE OF FRAUDS—Flexibility—Prevention of Fraud.—Courts of equity require a party to observe and perform his contract, though it is within the scope of the statute of frauds and is not in writing, if it has in good faith been fully performed by one party, and if refusal to perform it by the other will result in great injustice and the perpetration of fraud; but when a court of equity exercises this authority, it by no means brushes aside the statute or impugns its wisdom; on the contrary, it is so careful to see that the fraud which the statute was designed to guard against is not perpetrated that it adds to the statute a new strength by demonstrating that it may be so administered that justice will not suffer or the statute be made the instrument of the very evil it was designed to prevent. (p. 504.)

STATUTE OF FRAUDS—Proof of Oral Contract.—When one invokes the aid of equity to enforce, in the face of the statute of frauds, an oral contract, on the ground that it has been performed by him and that its nonperformance by the other party will result in injustice and fraud, the court requires him to prove his case, not by vague or shadowy evidence, not even by a preponderance of evidence, but by evidence so unquestionable in its character, so clear, cogent and convincing, that no reasonable doubt can be entertained of its truth, that no such doubt can linger either as to the existence of the contract or the certainty of its terms, or that the plaintiff has wholly performed his part. (p. 504.)

PLEADING—Amendment After Evidence Closed.—An amendment to a pleading which does not change substantially the claim or defense may, in a proper case, be allowed to be made even after the evidence is closed, but this is not always a confidence inspiring practice. (p. 506.)

EVIDENCE.—The Value of Admissions as Evidence depends upon the circumstances under which and to whom and when they

are made; sometimes they are of a high order of evidence, but at other times they are of little weight. Conversations had many years ago, of a casual character, in which the witness has no interest, and which he has no reason to remember, are of a low grade of evidence, especially if held with a person now deceased. (p. 508.)

EQUITY PRACTICE—Error in Admitting Incompetent Evidence.—It is an incorrect statement of the law to say that it is not error to admit incompetent evidence in an equity case, or that the finding of the trial court will never be reversed for such error. (p. 509.)

STATUTE OF FRAUDS—Oral Contract to Make Will.—Where the aid of a court of equity is invoked to enforce an oral contract whereby the owner of land agrees with his niece and her husband that, if they will move on his farm and take care of him when sick, they shall have his property upon his death, they claiming that they have fully performed their part of the agreement, the contract and its performance must be established by clear and convincing evidence. It is a significant circumstance, in such a case, that the children of the alleged devisees, though the contract is alleged to have been in existence thirty years, never heard of it, and that the devisees, at least on one occasion, abandoned the farm to seek a home elsewhere. (p. 511.)

Cyrus W. Anthony, Alvin Binjaman, M. G. Tate, Ira K. Alderman and J. L. Funk, for the appellants.

W. A. Blagg, T. A. Cummins and E. A. Vinsonhaler, for the respondents.

[276] VALLIANT, J. This is a suit in equity for the specific performance of a contract alleged to have been made in 1868 between one H. Monroe Sharp, who has since died intestate, on the one part, and the plaintiffs, who are husband and wife, on the other. The contract, as the petition alleges, was that plaintiffs, who were then residing in Clinton county, were to move to Nodaway county and there reside on a farm owned by H. Monroe Sharp, help improve it and remain there, aiding him as long as he should live, and at his death they were to have all of his property.

After all the evidence in the case was in and both sides had rested, the plaintiffs were permitted, over the [277] defendants' objection, to amend their petition, by erasure and interlineation, by striking out the words "help improve it and remain there aiding him," and inserting in lieu thereof "take care of him, the said Sharp, when he was sick and as long as he should live," etc. The alleged contract was not in writing.

The intestate died in August, 1902, at the age of seventy-eight, leaving a farm of two hundred and forty acres in Nodaway county, eighty acres in Warren, and eighty acres in

Morgan county, and personal property estimated at seven hundred dollars. Debts against the estate amounting to nearly one thousand dollars were allowed in the probate court. The intestate had never married. He had had four brothers and three sisters, all of whom had died before his death, except one brother, Michael Sharp, who is now living in North Carolina. The plaintiff, Dillie Russell, is the daughter of one of the deceased brothers. The defendants are the surviving brother, the descendants of the deceased brothers and sisters, and the administrator of the estate.

The petition states that the plaintiffs fully performed the contract on their part, and pray a specific performance on the other part by decreeing that they have the whole estate subject to the claims of the administration.

The defendants answered denying the allegations of the petition and pleading the statute of frauds. The trial resulted in a finding of the issues in favor of the plaintiffs and vesting the whole estate, subject to the claims of the administration, in the plaintiff, Dillie Russell. Defendants appeal.

The testimony on the part of the plaintiffs tended to prove that in 1868 they, being then married, moved from Clinton county to Nodaway and lived on the farm of Monroe Sharp, the bachelor uncle of plaintiff, Dillie Russell, he and they living together in his dwelling-house on the farm, Russell renting from Sharp part of the farm and paying him as rent therefor one-third of [278] the crop, Sharp retaining the rest of the farm in his own care. In 1870 or 1871 Russell bought a forty-acre farm about a mile from Sharp's, moved there with his family, and lived there two years, after which he sold the forty acres and moved back to Sharp's and again rented a part of the farm from him, Sharp charging him more rent than in the former years. As Russell's family increased in numbers the old bachelor uncle found it more agreeable to live alone, and he accordingly built him a little house about a quarter of a mile from the house occupied by the Russell family and moved into it, and he there lived practically alone for the last twenty or twenty-five years of his life, doing his own cooking, housekeeping, etc., and managing the part of the farm not rented to Russell. In his last illness, which began about three months before he died, he became helpless and was taken by the Russells to their house, and was cared for and attended by them and died there.

In this last illness he required much care and service of a personal character not agreeable to render, but the care was bestowed and the service rendered in a kind manner.

During the twenty or twenty-five years when he lived alone, Mrs. Russell frequently visited him and carried him bread that she had made and was kindly attentive to him, and her children also visited him. But during the most of that period he was able to take care of himself, and did not require much personal service.

The plaintiffs' evidence also tended to show that they planted fruit trees, built a corncrib, stable, henhouse and smoke-house, did some clearing, fencing, etc.

The testimony adduced to prove the alleged contract consisted entirely of admissions the old man was said to have made. This testimony may be summarized as follows:

L. J. Wood, a neighbor who lived four or five miles from Sharp, testified that he had a conversation with him twelve or thirteen years ago, in which Sharp said [279] that Russell had been with him about thirty years and that "I told him if he came here and stayed with me I would see that he got my house, and I calculate to make my word good if he stays with me." Sharp also said that Mrs. Russell had always done his washing and mending.

Logan Holt had known Sharp when they were young men; worked as carpenters together; "I and him used to be great old chums." Witness had lived in town and had not seen so much of Sharp in the last twenty years, but still owned a farm in that neighborhood; would see him occasionally. Before Russell came on the farm Sharp told witness he wanted to get the Russells to come and stay with him and help him. On one occasion witness reminded Sharp that he was getting old and asked him what he was going to do with his property, to which he answered: "Dillie Russell is going to get what I have. I allow for Dillie to have it." He said she had always been there, waited on him and took care of him. Witness being asked by plaintiff's attorney if Sharp ever said to him that he (Sharp) had told the Russells that if they would come there and stay with him until he died Dillie should have the property, he answered: "I wouldn't say right positive, but that is my impression. Now, this is a long way back to recollect anything." On cross-examination he said it was at least twenty years ago that he had this conversation with Sharp.

T. H. Williams had lived in the neighborhood and had "worked for him a little," and had had "a few words" of conversation with him about his relation with the Russells. It came about in this way: "He asked me how I came there with the folks that I did. I told him they raised me, and of course they expected me, if they had no children, to have what property they had at their death. I told him I understood that was the contract between him and Mr. Russell, and he said it was; he aimed for them to have what he had at his [280] death." This conversation was had twelve or thirteen years ago.

Norton Roberts had done some work for Sharp about two years ago. He said: "I asked him what he was going to do with his property; he was getting old; what he allowed to do with his property when he passed over; he said he allowed for them folks back there where we got dinner to have it." They had had dinner at the Russell's.

Plaintiffs' main witness, Collins, testified that in 1898 he reminded Sharp that he was getting old, had no family, and asked him why he did not sell the farm and move to town, to which the old man answered: "I made a contract with Russell before he moved on this farm, him and his wife, that if they would come on this farm and live with me and take care of me when I am sick, at my death all my property goes to Russell and his wife." Witness also testified that the Russells always took care of the old man when he was sick. On cross-examination this witness stated that he had no interest in the result of the suit, but he admitted he had been very active in aiding Russell in the matter, was surety on the bond for costs, had helped hunt up witnesses, had gone with Russell every time he went to consult his attorneys. On being asked if he had not said that he intended to carry the case to the supreme court and keep right along with it if it cost him eighty acres of land, he said: "Yes, sir, yes, sir; I am going to say that I said it. Let me tell you about that now. I was accused by the heirs of taking a bribe and getting eighty acres of land. I says to Culp: 'I am no cheap John lawyer.' I says: 'You might tell them fellows, if it will help them out a little, that Collins will spend eighty acres of land,' as a kind of joke or burlesque. Q. You did in that way? A. Yes, I own up to that. I did say to Thomas Glenn that it would be worth one thousand dollars to me to find a witness that would testify

to this contract. Q. I will ask you if you didn't tell Wesley McKibber about the time this suit was [281] brought that you considered yourself a member of the law firm that was trying the case? A. I did, yes, sir; I was talking around there. I done that in a joking way. I admit to it. It was kind of joke or burlesque to help the boys have a little fun. I did not tell Tom Glenn that if Russell would let me manage the case I would get at least eighty acres for him; let me tell you what I did tell him. Q. Well, go on. A. Now, I says if Russell manages that case right he will get a home out of it. He is entitled to it from what I know about the case, and I believe he ought to have it; I believe that justice would give it to him, according to what Monroe told me about the contract." On further cross-examination witness said that at first Russell was undecided whether he would put in a bill of expenses in the probate court against the estate or bring this suit. On redirect examination he said that Mr. Sharp was a peculiar man, rather superstitious and kept his business very quiet to himself.

S. B. Fargo testified that he was an attorney at law, that about two years ago Sharp spoke to him about writing his will, and later they met on the street in Skidmore by the public well and Sharp told him he was ready to have the will written; he said: "Well, I have got my mind made up how I want my property to go; I contracted the home place to Alex. Russell and his wife. There is more land there now than there was when Mr. Russell went on it, but they were to have the place for their taking care of me when I am sick and burying me. The other property I have disposed of any way, or will if you write my will just like that. I made a contract with Russell about thirty-five years ago and I can't annul it. I have fixed it with Russell and his wife, they will take care of me and bury me and they are to have the home place. They have grubbed it out." The will, however, was not written, because the witness asked five dollars for writing it, and Sharp offered two and a half, to which witness [282] replied, "Never on this earth, Monroe." On cross-examination this witness stated that he was employed by Russell as an attorney in this case (he does not, however, appear as attorney of record). On being asked if he had a contigent fee in the case he said: "No, sir, he pumped the cash right up, what he paid. Q. Who came first Russell or Collins to em-

ploy you? A. Well, sir, Russell. Russell and I—I can tell you right where we were. Q. Never mind that. A. Sitting on a seat— By the Court: Never mind that. A. All right, Judge, I will tell you all I know about it fairly and honestly, and no more; I ain't here for—money don't warp me—not one iota. I am as poor as anybody. Q. How was it? Plank it out. Let's get something. A. He gave me a retainer fee and he says: 'I can get money at Maryville when we are out there if you need any.' I says, 'Yes.' He promised me just so much money. Now no conditions pro or con. Q. How do you appear here to-day, as an attorney or as a witness? A. Sir? Q. Do you appear here to-day as an attorney or as a witness? A. I came here as a witness, because I was subpoenaed."

Al Russell, a son of plaintiffs, twenty-nine years old, testified that about eight years ago he went to Mr. Sharp to ask him to build a house for him on the farm, but Mr. Sharp wanted witness to build it and live on a certain forty acres; witness asked what he would do with the house in case of Sharp's death, and the latter said that at his death the witness' parents were to have the land, and he guessed they would not make him move it off. He told witness that if they stayed with him and took care of him during his last sickness they were to have it all. Witness did not recollect that the old man had had a spell of sickness for the last twenty or thirty years.

J. S. Bilby testified that about twenty-five years ago he went into Mr. Sharp's house to get out of the rain, and during the brief visit joked him about getting [283] married, and asked him what he was going to do with his property, to which he replied that he had decided to give it to Mrs. Russell, or had agreed to give it to her, witness did not quite remember which.

The testimony on the part of the defendants was to the following effect:

Monroe Sharp was seventy-eight years old when he died; until within the last few years of his life he was an active, industrious farmer, and generally in good health. When the Russells first came on the farm they lived in his house and he boarded with them. During the two years 1870-2, when they had moved away, he boarded with a neighbor, Mrs. Nunnelly, and paid her for same. When the Russells came back in 1873 Sharp boarded with them again for several years

until he built the little house into which he moved and where he lived alone until his last sickness. While he boarded with the Russells he paid Mrs. Russell two dollars a week for his board and twenty-five cents a week for his washing. There was nothing in the intercourse between Sharp and the Russells that was not usual between a landlord and a tenant, except a friendly relation to be expected between an uncle and his niece and her children living on his farm. The improvements put on the place by Russell were of temporary character and very inconsiderable in value. In 1889 Russell, declaring that land had become so high in Nodaway county that he could not hope to get a home there, made a run for a homestead in Oklahoma, but failed to get it and returned to the farm. Russell from time to time made statements to witnesses inconsistent with the contract he now asserts; to one witness he said that he had tried or was going to try to get Sharp to give him a deed to half of the farm and if Sharp would not do it he would get the land when Sharp died; to another witness he said that he had lived on that one hundred and twenty acres twenty years and the law gave him a title; to others he said that two of Monroe Sharp's brothers, then dead, had told [284] him if he would go on the place and take care of Monroe while he lived they would see that he got the place at his death; to others he said that he was going to put in a bill against the estate for services in the last sickness, and as there was sixty-three days of nursing he was entitled to count eight hours a day and put in the bill for three times sixty-three days. Russell heard of the old man's illness from a neighbor who had seen him the night before, and when Russell went to see him he found him helpless—paralyzed—and had him carried to his house where he remained until his death, something over two months. In addition to the nursing and attention given by the family there were two nurses hired who were paid out of the estate. The last six years of the old man's life he was not very well able to care for himself and he suffered for attention, though Mrs. Russell and her children did visit him occasionally and gave him some attention; the last two years of his life he gave signs of dementia and general breaking down, and when he was finally taken to the Russell home he was in a bad way.

The foregoing is the substance of the large volume of the evidence in the case.

The contract alleged in the petition is within the scope of the statute of frauds; it is of such a character that the law has deemed it prudent to declare that it will not be recognized unless it is in writing and signed by the party sought to be charged. The facts in this case illustrate the wisdom of this policy; if the law would allow an estate to be diverted from the statutory course of descent, by oral evidence of an oral contract alleged to have been made more than thirty years ago, after the death of the party whose estate is sought to be affected and whose lips are therefore sealed, it would be not only a constant menace to the peace of families, but a constant temptation to the commission of fraud and perjury. It was for that reason that that which we call the statute of frauds, which in its original form [285] adopted in England recited in its preamble that it was designed to prevent fraud and perjury, was adopted. That statute has so commended itself to the wisdom of the lawmakers, that it has been adopted in all countries deriving their laws from England.

But to the Anglo-Saxon mind a law, however wise and just in its general application, is not of such inflexible character that it will always be applied regardless of circumstances, where its application would result in the perpetration of fraud. So it has been said that equity in such case will interpose to prevent the statute of frauds from being made the instrument of fraud. And therefore it has come to be the recognized authority of courts of equity in England and in this country to require a party to observe and perform his contract though it be within the scope of the statute and be not in writing, if it has been in good faith fully performed by one party and if refusal to perform it by the other would result in great injustice and the perpetration of a fraud. But when a court of equity exercises this authority it by no means brushes aside the statute of frauds or impugns its wisdom; on the contrary, it is so careful to see that the fraud which the statute was designed to guard against is not perpetrated that it really adds to the statute a new strength by demonstrating that it may be so administered that justice will not suffer or the statute be made the instrument of the very evil it was designed to prevent.

And how does a court of equity accomplish this? By the simple common-sense rule of requiring one who invokes the aid of equity in such case to prove his case, not by vague or shadowy evidence, not even by a mere preponderance of evi-

dence, but by evidence so unquestionable in its character, so clear, cogent and convincing, that no reasonable doubt can be entertained of its truth; that no such doubt can linger either as to the existence of the contract or the certainty of its terms or that the plaintiff has wholly performed his part.

[286] We have said this so often in this kind of cases that we are at a loss to find terms in which it can be said again with more effect: Gupton v. Gupton, 47 Mo. 37, 20 S. W. 881; Sutton v. Hayden, 62 Mo. 101; Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; Healey v. Simpson, 113 Mo. 340; Nowack v. Berger, 133 Mo. 24, 54 Am. St. Rep. 663, 34 S. W. 489, 31 L. R. A. 810; Steele v. Steele, 161 Mo. 566, 61 S. W. 815; Lynn v. Hockaday, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885; Kinney v. Murray, 170 Mo. 674, 71 S. W. 197; McElvain v. McElvain, 171 Mo. 44, 71 S. W. 142; Goodin v. Goodin, 172 Mo. 40, 72 S. W. 502; Asbury v. Hicklin, 181 Mo. 658, 81 S. W. 390. The same thought runs through many other cases in our reports referred to in the briefs of counsel on both sides.

Does the plaintiff's evidence in the case before us come up to this standard?

Before discussing the evidence let us look at some of the circumstances surrounding the case. According to the plaintiffs' petition as it was when the parties went to trial, and as it was until all the evidence was in, the contract was that the plaintiffs were to come to Nodaway county, there reside on the farm of Monroe Sharp, help improve it and remain there aiding him as long as he should live, and for that, at his death, they were to have all of his property. Under that statement of the contract the part the plaintiffs were to do was to help improve the farm and aid Monroe Sharp. The idea that the plaintiffs were to take care of him when he was sick did not appear in the case until the evidence had closed, then the allegation of helping to improve the farm was cut out and that of attending Sharp in sickness was inserted in its place. An amendment in a pleading which does not change substantially the claim or defense may, in a proper case, be allowed by the court to be made, even after the evidence is closed: Rev. Stats. 1899, sec. 657; Carr v. Moss, 87 Mo. 447. It is unnecessary in this case to decide whether the court exercised a wise discretion in allowing this amendment to be made when it was, because we are not now viewing it under the rules of pleading, [287] but

are considering it as it bears on the probative character of the whole case as made by the plaintiffs' pleading and proof. Sometimes a party may make an amendment at that stage of the proceeding without impairing confidence in his case, but when, as here, something more than a mere preponderance of evidence is required, the fact that the plaintiffs themselves seem not to have known what their contract was until all the evidence was in, gives the case a doubtful aspect to begin with. If they were not certain themselves as to the essential terms of their contract, how could they hope to establish it beyond a reasonable doubt in the mind of the court? In the beginning, they said that they were to help improve the farm, aiding Sharp as long as he lived, and for that they were to have the whole of his property at his death, and at the trial they adduced evidence tending to show that they made improvements, but the evidence for the defendant on that point left it at least very doubtful if there were any lasting or valuable improvements made by them; then they turned their attention to the subject of the nursing and caring for the old man in his last illness, and in the end amended their petition to rest on that ground. That is not a confidence inspiring practice in this kind of a case.

There was no attempt to show why this contract was not reduced to writing. This is not like many of the cases that have come before us where the alleged agreement was for the adoption of a young child who was taken into the family and reared. In such case the child could not be expected to see to the execution of the deed of adoption, but here were parties old enough to take care of their own interests, and the very fact that there was no writing is a circumstance that calls for an explanation on their part. These were not ignorant people; it is unreasonable to presume that either Sharp or the Russells would have entered into such a contract to run for a lifetime, with no writing to show for it. The evidence shows that Russell is a man of sense, [288] and that he appreciated the importance of a writing to prove such a contract.

There is another fact that casts doubt on the plaintiffs' case. If they spent the thirty-odd years of their lives on this farm as in the fulfillment of their part of the alleged agreement, it would be most natural that their children, who were born and reared on the farm, would have at least heard something about the contract, yet, although three of them

were witnesses for the plaintiffs in the case, it seems that they never heard of it.

One of the daughters, Miss Ora Russell, twenty-four years old, testified that she had never heard of such a contract, and it appears inferentially from the testimony of the son that he had never heard of it. It is highly improbable that there should have been a contract of such importance to their welfare, yet it was never spoken of in the family.

When men reach or are approaching an age and condition in which it behooves them to provide for their own nursing when they will be no longer able to take care of themselves, it is quite natural that contracts should be made of the kind alleged to have been made in this case, and when made they are deemed in law meritorious and are upheld. But there was no such age or condition in sight in 1868, when Sharp is said to have made this contract. He was then in the prime and vigor of his life, the evil days had come not, nor had the years drawn nigh when he might naturally apprehend the necessity of such guardianship. The common experience of mankind does not teach that men in the full prime and vigor of life brood upon such subjects. We do not, of course, say that a man of Sharp's age and strength and means could not make such a contract, but we do say that he is not so apt to do so as one whose condition suggested a necessity for it, and that that is a fact to be considered when we are weighing the evidence.

289 Plaintiffs rely upon the full performance on their part of the contract to take it out of the operation of the statute of frauds. The obligation of the plaintiffs under the contract, if there was such obligation, appears to have sat lightly on them. According to their pleading theirs was a continuing duty, to run as long as they and Sharp should live, yet after remaining two years on the farm, they abandoned it, bought a farm of their own and took up their abode on it, and for two years declared by their conduct that their contract with Sharp was ended. Then for some cause unexplained they sold the forty acres they had bought and moved back on the Sharp farm and thereafter paid higher rent than before. Then again, when the territory of Oklahoma was thrown open to the public, Russell, declaring that land in Nodaway county had risen in price so high that he could not hope to obtain a home of his own there, tried his fortune in Oklahoma, and, if we judge him by his conduct, we are bound

to presume that if he had been successful there he would have abandoned the Sharp farm forever, but failing there, he returned. Is that the conduct of a man who is to be rewarded as for the faithful observance of a lifelong contract?

The evidence on which the plaintiffs rely to prove their alleged contract consists entirely of admissions said to have been made by Monroe Sharp in his lifetime.

The value of admissions as evidence depends on the circumstances under which and to whom and when they were made. Sometimes admissions are of a high order of evidence, but sometimes, also, they are of little weight. Here the evidence, except that of witness Fargo, related to fragments of casual conversations held without any definite purpose, with persons who had no interest in either hearing or remembering what was said, and who undertook to recall it after many years and some of whom at least, according to defendants' [290] evidence, would perhaps have never remembered it if the industry of Collins had not brought it back to their minds. There was nothing to impress these alleged conversations on the minds of either of these witnesses, and, therefore, without imputing to them a purpose to speak falsely, we may well say that they are so liable to have put a wrong interpretation on what was said or on what, after many years have passed, they now think was said, the testimony is not trustworthy. Persons attempting to repeat from memory conversations they have heard are liable, under the most favorable circumstances, to make mistakes and give wrong impressions; therefore such is never a high grade of evidence. But when the conversations were of a casual character, in which the witness had no interest, and there was no reason why he should remember it, if he does undertake to recall it after many years, we are bound to regard it as a low grade of evidence. Under such conditions such testimony, even if it related to conversations said to have been held with men yet living, is of little value, but when under those circumstances a witness undertakes to say what men who are now dead said, we ought to receive the testimony with a great deal of caution. But, except in the testimony of Collins and Fargo, the admissions that Sharp is said to have made are as indicative of a benevolent voluntary intention to provide for Mrs. Russell by will as they are of a contract, or even more so.

The only witness whose testimony indicates a serious purpose for the conversation which he attempts to repeat is Fargo, who said that Sharp wanted him to write his will, but even that conversation occurred at an accidental meeting of the witness at the town pump.

When this witness was offered and it came out that Sharp was talking with him as an attorney at law, with a purpose of employing him to write his will, objection to the testimony was made on the ground that the conversation was under the seal of professional confidence. [291] The court overruled the objection, remarking at the time that it had been decided by the supreme court that it was not error to admit incompetent evidence in the trial of an equity case. The learned judge did not mention the case in which the decision referred to was made, and we are not aware of any case in which this court has so held. But, as it is the rule in this court to review the evidence and find the facts in an equity case when the facts are in dispute, we have not always held that it was reversible error when we have found that incompetent evidence had been admitted, because in most cases we could separate the incompetent from the competent and reach a conclusion from the legal evidence, but we have never meant to say that it was not error to admit incompetent evidence in an equity case or that the finding of the trial court would never be reversed for such error. Whether for such an error the finding would or would not be reversed would depend on the circumstances of the particular case. Sometimes even in an equity case the judgment may be reversed and the cause remanded for a new trial. In the case at bar, however, after hearing the testimony of this witness, the learned judge reconsidered the point and excluded the evidence.

Even if the evidence of this witness is competent, it is not clear and is not satisfying. In one breath he says that Sharp told him that he was now ready to have his will written and had made up his mind as to how he wanted his property to go. That would indicate that up to that time at least the disposal of his property by will was a matter he had held in doubt and he had only just then made up his mind about it. Then, according to the witness, Sharp went on to say: "I contracted the home place to Alex. Russell and his wife. They were to have the place for them taking care of me and burying me. The other property I have disposed of

anyway, or will." This witness, on cross-examination, admitted that he was under the pay of the [292] plaintiffs and had helped Collins to work up the case; he said that he was employed as an attorney in the case. But if he was an attorney and was in good faith employed as such in the case he would most likely have appeared as such on the record and have taken some part in the trial; the character of his employment would not have been kept secret.

Plaintiffs' main witness was Collins. He testified by way of introduction to the conversation that in 1898 he reminded Sharp that he was getting old and advised him to sell his farm and move to town. This introduction implies that this witness was taking the interest of an intimate friend in the old man, and it also implies that there was then something in the old man's condition and environment that suggested that he ought to be where, in case of need, he could be attended to. If he was on the terms of intimate friendship that his preamble implies, and if the Russells were giving the old man the kind attention it is now claimed they gave him, this witness would doubtless have known it, and therefore there would have been no occasion for such advice.

But the evidence shows that Collins and the old man were at that time not on terms of good neighborship; if not actually unfriendly, they were at least not friendly. Witnesses for the defendants testified that Sharp was a reserved man, and was not in the habit of talking about his business, and this witness Collins himself said so; yet he would have the court believe that in this conversation in 1898 the old man laid aside his habitual reserve and confided to the witness that he could not take the advice to sell out and move to town because he was under constraint of a contract made with Russell before he moved on the place, that if they would come to the farm and live with him and take care of him when he was sick they should have all his property at his death. According to this witness they were to have, not the home place merely, as Fargo said, but [293] everything, including the land in Warren county and Morgan county.

That this witness is the mainspring in the prosecution of this suit, and has taken on his hands more than would be expected of a disinterested neighbor, appears from his own evidence, and if the evidence of some of the defendants' witnesses is believed he has been unduly active in the matter. His testimony is not convincing.

Taking the case with all the circumstances of improbability surrounding it, the evidence adduced to sustain the plaintiffs' cause falls short of the standard of proof that a court of equity requires in such case.

The judgment is reversed and the cause remanded to the circuit court with directions to enter judgment for the defendants.

All concur except Brace, P. J., absent.

An Agreement to Make a Will devising real estate may be enforced in a proper case, although it rests in parol, if there has been such a part performance as will take it out of statute of frauds. But to take the contract out of the statute on the ground of part performance, the terms of the agreement must be clear, definite and unequivocal, and the acts relied upon as part performance must be exclusively referable to the contract: Cooper v. Colson, 66 N. J. Eq. 328, 105 Am. St. Rep. 660; Stellmacher v. Bruder, 89 Minn. 507, 99 Am. St. Rep. 609; Laird v. Vila, 93 Minn. 45, 106 Am. St. Rep. 420; Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653; Ellis v. Cary, 74 Wis. 176, 17 Am. St. Rep. 125; notes to Christy v. Barnhart, 53 Am. Dec. 545; Johnson v. Hubbell, 66 Am. Dec. 788.

TRI-STATE AMUSEMENT COMPANY v. FOREST PARK HIGHLANDS AMUSEMENT COMPANY.

[192 Mo. 404, 90 S. W. 1020.]

FOREIGN CORPORATION—Noncompliance with Law—Validity of Contracts.—If a statute prohibits foreign corporations from doing business in the state without first having complied with the law, this prohibition is as effective to make the contracts of such corporations void as though the statute in terms so declared them; for if an act is prohibited or declared unlawful, it is not necessary for the law to declare the act or contract void; an unlawful act is itself void. (p. 524.)

FOREIGN CORPORATION—Noncompliance with Law—Validity of Contracts.—If a statute provides that foreign corporations, before transacting business in the state, shall perform specified acts, and declares that corporations which do business in the state without complying with such conditions shall be subject to a fine and cannot maintain an action in the courts of the state, a contract entered into by a corporation and partly performed before it has complied with the statute is void, and an action cannot be maintained for a breach of the contract, although prior to the commencement of the suit the law is complied with. (p. 526.)

FOREIGN CORPORATION—Noncompliance with Law—Validity of Contracts—Comity.—Contracts entered into by a foreign corporation in the state of its domicile, with a citizen of this state, if valid there and not prohibited by the law here, may be enforced in this state as a matter of comity, although the corporation has not complied with the statutes prohibiting it to do business in this state without first complying with their terms. (p. 526.)

John D. Johnson and Virgil Rule, for the appellant.

E. C. Crow and Rassieur, Schnurmacher & Rassieur, for the respondents.

[408] MARSHALL, J. It is not altogether clear whether this action is intended as a proceeding in equity for an accounting and to recover the amount found to be due, or whether it is an action at law for damages; and it is not necessary to determine the character of the action, for the result must be the same whichever view be taken of the case.

The trial court sustained a demurrer to the petition, and the plaintiff appealed.

The material allegations of the petition are: That the plaintiff company is a corporation organized under the laws of the state of Illinois; that on the 5th of April, 1898, the defendant company had a leasehold interest in and to certain real estate situated in the city of St. Louis and lying just south of Forest Park, on which it maintained a pleasure resort, with pavilion, theater, stage and other buildings used for giving theatrical performances; that the stage faced the pavilion and the latter was surrounded by a railing, in which were more than one thousand seats for persons attending the performance, and which are hereafter referred to as reserved seats; that back of the reserved seats there was an open space for chairs for like purposes, but without being inclosed with a railing; that on the 5th of April, 1898, the plaintiff entered into a written contract with the defendant company and one John D. Hopkins, by which the defendant company agreed to furnish to the plaintiff the pavilion, theater and reserved seats for the purpose of giving theatrical performances therein, beginning on the 2d of May, 1898, and expiring fifteen weeks thereafter, the performances to be daily performances, with Wednesday, Saturday and Sunday matinees; that the plaintiff was to furnish the performances, do certain advertising, and to receive the twenty-five cents per person paid for admission to the reserved seats, and one-half of the ten cents per person charged for admission to the unreserved seats; and, if the amount so received by plaintiff did not equal twelve hundred dollars [409] per week, the defendant was to make up the deficit; that settlements on account of the twenty-five cents admission should be made each Tuesday, and the settlements for the one-half of the ten-cent admissions were to be made daily; that the

defendant Hopkins was to act as manager of the theatrical performances; and that the defendant company was to have the right to sell wines, liquors and other refreshments anywhere on the grounds, including the space set apart for reserved seats; that, pursuant to the contract, plaintiff company entered upon the performance thereof and gave theatrical performances at the times specified until or about the 10th of September, 1898, when the defendant company refused to allow the plaintiff company to further perform the conditions of the agreement, and has ever since so refused; that the defendant company knew, when it entered into the contract, that the agreement between plaintiff and said Hopkins was, that the plaintiff was to pay all the expenses incident to the contract on its part and be entitled to all the profits realized therefrom, and that thereafter, to wit, on August 29, 1898, for a valuable consideration Hopkins sold and assigned to the plaintiff all of his interest in said contract. The petition then charges that the defendant company was guilty of a breach of its contract on the 10th of September, 1898, by refusing to allow the plaintiff to carry out the contract, and by entering into an agreement with the defendant Hopkins for the purpose of collusively and fraudulently ousting and excluding plaintiff from the premises, and preventing it thereafter from giving theatrical performances; and further agreed with Hopkins to give such performances itself under the directions and management of Hopkins. It is further stated that the plaintiff is unable to state the profits realized by the defendants from the performances given after the 10th of September, 1898; but it is averred on information and belief that the profits [410] amounted to thirty thousand dollars, and that the plaintiff has been denied that sum.

The prayer of the petition is, that an accounting be taken and that plaintiff have judgment against the defendants for the damages so ascertained. The petition further alleges that the contract was to last during the whole term of the lease that the defendant company had on the premises, which would expire on the fourth day of March, 1903. The suit was instituted on the sixteenth day of August, 1899. The petition further alleges, that on the 14th of April, 1899, it complied with the laws of this state governing foreign corporations, and was duly authorized by the laws of this state to do business in this state.

The defendants demurred to the petition on three grounds, to wit: 1. Because the petition does not state facts sufficient to constitute a cause of action; 2. Because the petition does not state facts sufficient to entitle plaintiff to any equitable relief; 3. Because there is a defect of parties plaintiff, in this, that Hopkins was not made a plaintiff in the action.

1. The decisive question in this case for determination is, as to the validity of the contract upon which the action is based.

The plaintiff is a nonresident corporation. At the date of the contract it had not complied with the laws of this state regulating the right of foreign corporations to do business in this state. It transacted business in this state under the contract from the 22d of May until the 10th of September, 1898. During that time it never complied with the laws of this state relating to foreign corporations. Before the institution of this suit, to wit, the 14th of April, 1899, the plaintiff complied with the laws of this state. The question, [411] therefore, is, whether such compliance before suit brought but after the contract was entered into and after the plaintiff had transacted all of the business under the contract until prevented from further doing so by the defendant, affects the validity of the contract as to the business done and to be done, or whether it only affects the remedy. The question under consideration must be determined upon a construction of the act of 1891 (Laws 1891, p. 75), now sections 1024, 1025 and 1026 of the Revised Statutes of 1899.

Section 1024 provides, in substance, that every corporation for pecuniary profit formed in any other state, territory or country, "before it shall be authorized or permitted to transact business in this state, or to continue business therein if already established, shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers," etc.

Section 1025 provides that: "Every company incorporated for purposes of gain under the laws of any other state, territory or country, now or hereafter doing business within this state, shall file in the office of the Secretary of State a copy of its charter or articles of incorporation, or, in case such company is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal officer or agent in Missouri of said corporation shall make and forward to the Secretary of State, with the articles or certificate above provided for, a statement duly sworn to of the proportion of the capital stock of the said corporation [412] which is represented by its property located and business transacted in this state, and the corporation shall pay into the treasury of this state upon the proportion of its capital stock represented by its property and business in Missouri, incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this state." It further provides that: "Upon compliance with the above provisions by said corporation, the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this state, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Missouri," etc. The section contains other provisions not necessary to be referred to here.

Section 1026 provides that, every such corporation for pecuniary profit, organized under the laws of another state, now doing business in or which may hereafter do business in this state, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than one thousand dollars, to be recovered before any court of competent jurisdiction, and it is made the duty of the Secretary of State to report such failure to the prosecuting attorney of the county, who is required to institute proceedings to recover the fine. The section further provides: "In addition to which penalty, on or after the going into effect of this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort; provided, that the provisions of this section shall not

apply to railroad companies which have heretofore built their lines of railway into or through this state; nor to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident."

Section 1027 exempts insurance companies from [413] the operation of this statute, for the reason, manifestly, that such companies are controlled and regulated by other provisions of the statutes.

These statutory provisions have undergone judicial determination in this state. In Williams v. Scullin, 59 Mo. App. 30, the St. Louis court of appeals, speaking through Rombauer, J., held that a contract made and to be performed in this state by a foreign corporation which had failed to comply with the act was invalid. The argument was made in that case that the statute was not intended to affect the validity of the contract, but only the remedy for the enforcement thereof, but the court refused to so construe the statute, and held that the statute struck at both the validity of the contract and the remedy for the enforcement thereof. The question came again before the St. Louis court of appeals in Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co., 60 Mo. App. 148, and that court, speaking through Biggs, J., again held that the statute affected both the contract and the remedy, and that the purpose of the statute was to prevent such foreign corporations from enjoying equal advantages of trade with domestic corporations without bearing any of the public burdens imposed on the latter. In that case the goods were ordered by mail from St. Louis, and shipped by the plaintiff from its place of business in New York, and it was held that the statute did not apply, because the plaintiff had not become "permanently located in this state for the purpose of prosecuting its business."

The question came before the Kansas City court of appeals in Blevins v. Fairly, 71 Mo. App. 259, and that court, speaking through Ellison, J., followed the decisions of the St. Louis court of appeals above referred to, and further held that a subsequent compliance by such corporations with the statute did not relate back and validate a transaction which was invalid when it took place. The goods in that case were ordered from a traveling salesman, and the corporation had not established [414] itself here as a "resident foreign corporation," and therefore the statute was held not to apply.

The question came before this court in Carson-Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420. That was an action by attachment upon notes executed by the defendant to the plaintiff for goods sold and delivered. The opinion in the case does not show whether the contract was entered into in this state or in a foreign state. Presumably, from what is stated in the opinion, the contract was made in another state; and, as no objection was made to the validity of the contract under our statute, the contract was a valid contract according to the laws of the state in which it was made. No point was made, and, therefore, no adjudication was had, as to the validity of the contract. The only point urged and decided in that case was whether or not a foreign corporation could "maintain" an action in this state without having complied with the laws of this state until after the action was instituted, but did so comply before the motion to dismiss the suit was filed. The question considered and adjudicated in that case was the effect and meaning of the provision of section 1026, which, in addition to other penalties, provided that no such foreign corporation "can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort." It was held that the word "maintain" meant, literally, "to hold by the hand," and in its ordinary use, "to uphold, to sustain, to keep up," while in pleading the law dictionaries define it to mean, "to support what has already been brought into existence"; and under that construction it was held that the word "maintain," as used in the statute, was broad enough to authorize a compliance with the statute after suit had been instituted. The question of whether or not the corporation had become permanently located in this state was not raised or passed upon.

It is to be observed, however, that it was said in [415] that case that the paramount object of the statute was "to place foreign and domestic corporations on a footing of equality in the field of commerce."

The decision in that case has led to a diversity of ruling between the Kansas City and St. Louis courts of appeals. The Kansas City court of appeals, speaking through Ellison, J., in Ehrhardt v. Robertson, 78 Mo. App. 404, held that the Carson-Rand case (129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420) did not have the effect of overruling the prior adjudica-

tions of the courts of appeals in this state, which held that the act struck at both the validity of the contract and the right to maintain an action for the enforcement thereof, but that it simply construed the provision of section 1026 affecting the remedy and did not touch upon or decide the question of the validity of the contract under sections 1024 and 1026. The court further pointed out that ever since the decision of this court in Downing v. Ringer, 7 Mo. 585, the courts of this state had adhered to the doctrine laid down by all text-writers, that where an act is prohibited by statute it is void, although not declared in the statute to be void; that an unlawful act or a prohibited act is a void act, and that no rights could arise out of it. The court also pointed out that there was but one exception to that general rule of law to be found in the decisions of this court, and that was in reference to revenue laws: Columbus Ins. Co. v. Walsh, 18 Mo. 229. The learned judge who wrote the opinion in that case cited the prior adjudications, which held that a contract entered into by a foreign corporation that had not complied with our statutes was void; and cited cases from Pennsylvania, Alabama, Oregon, Tennessee, Illinois and Wisconsin which so construed similar statutes of those states; and called attention to the fact that the courts of Massachusetts held to the contrary, because the statutes of that state provided expressly that such contracts should be valid and affected only the remedy. For the foregoing reasons, the Kansas City court of appeals held that the Carson-Rand case only [416] decided that an after-compliance with a statute would authorize the foreign company to maintain a suit, but that it did not decide that an after-compliance with the statute would relate back and make valid a contract which was prohibited by the statute.

On the other hand, the St. Louis court of appeals in the case of Chicago Mill etc. Co. v. Sims, 101 Mo. App. 569, speaking through Goode, J., construed the Carson-Rand case (129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420) as overruling the prior decisions of the two courts of appeals; and, upon the faith of that construction, and of cases decided in other jurisdictions, notably Washington, West Virginia, Indiana, Massachusetts, Colorado, South Dakota and by the federal courts, and from a consideration of the purposes and spirit of the statute itself, held that an after-compliance with the

statute rendered the contract valid, as well as authorized the foreign corporation to maintain an action for the enforcement thereof. But one of the judges of that court deemed the opinion in that case to be in conflict with the decision of the Kansas City court of appeals in Ehrhardt v. Robertson, 78 Mo. App. 404; and accordingly, that case was certified to this court and that case is now pending in this court.

It is proper at this stage to note that the statute under consideration came before this court for adjudication in Hogan v. St. Louis, 176 Mo. 149, 75 S. W. 604. That was a case wherein a resident taxpayer sought to enjoin the city from entering into a contract with a foreign corporation to light the city. The city had advertised for bids to do the work of lighting it. The foreign corporation had submitted a bid and a contract had been entered into, but no business had been transacted in this state. The contention of the plaintiff was that before a foreign corporation could submit a bid or enter into a contract in such a case it was required to comply with the statutes, and that if it had not so complied when it submitted its bid and entered into the contract they were void. This court, speaking through Valliant, J., [417] drew a distinction between submitting a bid and entering into a contract, and transacting business in this state, saying: "Of course, a contract cannot be lawfully made to do an unlawful act, but a contract may be lawfully made to do an act which the contracting party can lawfully do only when he shall have complied with conditions or satisfied other demands, and his unconditional contract to do it carries with it the obligation to comply with those conditions or satisfy those demands; he assumes the risk of being able to do so. Therefore, when the Kern company entered into this contract, although it could not lawfully perform it without conforming to the conditions of the Missouri statutes, yet the contract carried by implication the obligation on the part of the company that it would conform to those conditions, and a neglect to do so, resulting in a failure to perform, would have been a breach of contract." It was further held that entering into a contract to transact business was, in the unlimited meaning of the term, "transacting business," but that such was not the meaning of the term "transacting business," used in the statute. Accordingly, it was held that the contract entered into by the city with the foreign corporation pursuant to the

bid of that corporation, and under which no other business had been transacted by the foreign corporation, was not within the prohibition of the statute.

The consideration of the statute again came before the Kansas City court of appeals in Henderson Woolen Mills v. Edwards, 84 Mo. App. 448. There the plaintiff was a non-resident corporation and had sold goods to the defendant, the contract, so far as appears from the opinion, being made in the state in which the plaintiff was authorized to do business and therefore was a lawful contract under the laws of that state. The point in that case was as to the validity of the contract, and no point seems to have been made, and none was decided, [418] upon the question of remedy. It was contended by the defendant that the decision in Ehrhardt v. Robertson, 78 Mo. App. 404, controlled the case, but the Kansas City court of appeals, speaking through Ellison, J., held that the Ehrhardt case was inapplicable to the case undergoing adjudication. And further held that the contract involved in that case was a valid contract under the laws of the state where the contract was made and was therefore valid under the laws of this state, and as no point was made as to the right to maintain the action, the judgment in favor of the plaintiff was affirmed.

The question came before this court again in Trower Bros. Co. v. Hamilton, 179 Mo. 205, 77 S. W. 1081. In that case the contract was made and to be performed in Kansas. The money loaned was secured by a mortgage on cattle in this state. The suit was an action in replevin for the cattle, after condition broken. The plaintiff had never complied with the statute and the defense was that the contract was void. No question as to the right to maintain the action was raised by the pleadings. The contract was also charged to be usurious under the laws of Kansas. It was held that as the note and mortgage were "valid under the laws of the state where executed, there is no obstacle in the way of their enforcement under the laws of this state, unless it be because of plaintiff's failure to comply with sections 1025 and 1026 of the Revised Statutes of 1899, before bringing suit, as section 3710 of the Revised Statutes of 1899 has no application to such mortgages. But if it has, its effect is to invalidate a mortgage given as security to a Kansas contract, and it is as to such contract invalid under the fourteenth amendment to the federal constitution: Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct.

Rep. 427, 41 L. ed. 832; Bedford v. Eastern etc. Loan Assn., 181 U. S. 227, 21 Sup. Ct. Rep. 597, 45 L. ed. 834." Thus it will be observed that the validity of the contract and not the right to maintain the action was the point decided in that case. But a foreign corporation that had never complied with [419] the laws of this state was permitted to invoke the aid of the courts of this state to enforce a contract that was valid according to the laws of the state of its domicile. It will be noted, however, that the corporation had not "permanently located" in this state nor become a "resident foreign corporation."

The foregoing is the state of prior adjudication in this state concerning the subject in hand. It will serve no useful purpose to analyze the decisions of sister states upon similar or somewhat similar statutes. Each of the courts of appeals has decided that the weight of authority in other states sustains their respective decisions. That there is a conflict of authority must be conceded; and it therefore remains for this court to construe the statutes in its own way. At the outset it will be observed that the decision of this court in Carson-Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, did not decide the question here involved, nor did it in any manner discuss, much less decide, the effect of the statutes (Rev. Stats. 1899, secs. 1024, 1025) upon the validity of contracts made and to be performed in this state by foreign corporations that had not, before entering upon the performance thereof, complied with the provisions of those statutes. Inferentially, such contracts were treated as void in Hogan v. St. Louis, 176 Mo. 149, 75 S. W. 604.

It is manifest from the language of the statute itself that it was the intention of the legislature to place foreign corporations doing business in this state and deriving profit from business done in this state with citizens of this state, upon an equality with domestic corporations authorized by the laws of this state, and likewise to require such foreign corporations to bear the same burdens that domestic corporations have to bear. To accomplish this purpose, the statute (section 1024) prohibits any foreign corporation organized for pecuniary profit "to transact business in this state, or to continue business therein if already established" until it shall have established, and shall maintain, a public [420] office in this state where legal service may be had upon it, and where proper books shall be kept to enable such corporation to comply with

the constitutional and statutory provisions governing such corporations, and makes such foreign corporations subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state; and further provides that they shall have no other or greater powers than domestic corporations. And section 1025 further provides, that every such foreign corporation so organized, now or hereafter doing business within this state, shall file with the Secretary of State a copy of its articles or certificates of incorporation, with the sworn statement of its principal officer or agent in Missouri, showing the proportion of its capital stock which is represented by its property located and business transacted in this state, and requires such corporation to pay incorporation taxes and fees equal to those required of similar corporations formed within and under the laws of this state. In this way the lawmakers intended to make foreign corporations become locally incorporated in like manner and with like obligations and liabilities as are required of domestic corporations, and prohibit such foreign corporations from transacting business in this state until they have become so locally incorporated. Thus, the statute strikes at the validity of business transacted or contracts entered into in this state prior to the foreign corporation becoming locally incorporated. If the statute had stopped here, and made no other provision, or provided no other penalty, there would be no room for cavil that it was the intention of the legislature to make contracts invalid that were entered into in this state by foreign corporations before complying with the statute, and such contracts would thus be void, and effective means of preventing foreign corporations from entering into such contracts with citizens of this state would have been afforded. But the [421] legislature went further and by section 1026 provided a penalty or a fine of one thousand dollars to be recovered by the state's officers from corporations that failed to comply with the act; and went further still and, in addition to the penalty, provided that no such corporation should be entitled to maintain any suit or action upon any demand, whether legal or equitable, where it had failed to comply with the statute.

Thus, it is clear that the statute strikes at not only the validity of the contract, but also the right of the company to do business in the state or maintain an action for the en-

forcement of a contract concerning business transacted in this state. The Carson-Rand case only goes to the effect of holding that an after-compliance with the statutes will enable such foreign corporation to maintain the action, but it does not hold that such afte-compliance will relieve such corporation from the penalty or fine prescribed, nor does it hold that the contract itself is a valid contract. The two latter features were not passed upon or decided in that case. Some of the cases decided by the courts of appeals have drawn a distinction between such foreign corporations as have "permanently located" in this state or have become "resident foreign corporations," without complying with the laws, and foreign corporations that have made contracts in the state of their domicile with residents of this state, and where the foreign corporation simply seeks the aid of the courts of this state to enforce such contracts.

As to the contracts made by foreign corporations in the states of their domicile with citizens of this state, the contracts being valid according to the laws of the state where made, the lex loci contractus governs and will be enforced in this state as a matter of comity, unless the contract is prohibited by the laws of this state. In other words, such cases present the feature of a valid contract which one of the contracting parties qualifies himself to enforce in the courts of this state; [422] and, therefore, those cases relate to the remedy and not to the right or validity of the contract. Of course, in every case there must be not only a legal subject matter but also a plaintiff competent to sue under the laws of this state. The Carson-Rand case (129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420) falls within the principle here announced, and the case at bar falls within a similar principle as far as relates to the remedy, and under that principle there is in this case a competent party plaintiff under the laws of this state. But there is also present in this case the other feature which was not present in the Carson-Rand case, to wit, the question of the validity of the contract or subject matter of the suit. In this case the plaintiff entered into a contract and proceeded with the performance thereof for nearly four months, and seeks to recover for profits it would have earned under that contract for over four years thereafter if it had not been prevented from carrying out the contract by the act of the defendant. So far, therefore, as this case is concerned, the plaintiff has received the full benefits of its contract with

a citizen of this state for four months without complying with any of the laws of this state relating to foreign corporations, and it now asks the aid of the court to enforce a contract that is executory and cannot be completed for four years after the suit was instituted. It has well been said that the purpose of the statute is to place foreign corporations upon an equality with domestic corporations and impose the same burdens upon them that domestic corporations have to bear, and to prevent foreign corporations from deriving benefits of business done with citizens of this state while bearing none of the burdens imposed upon like corporations organized under the laws of this state. To entitle domestic corporations to do business in this state, they must first become incorporated and pay to the state the incorporating taxes and fees required by the statute. To place foreign corporations upon an equality with domestic corporations, they should be, and are, required, [423] also, to pay a similar amount to the state. Such foreign corporations, in order to be placed upon such an equality, must also put themselves in the same position that domestic corporations are required to be placed in with respect to the constitutional and statutory requirements of this state, among which is that there shall be some person in this state upon whom service can be had in the event they do not fulfill their contracts with residents of this state, if such residents desire to recover for a breach thereof.

It is too clear to admit of cavil that if foreign corporations are allowed to come into this state and do business with its people, derive all the benefits of such business, and fail to comply with the requirements of the statutes unless they need the aid of the courts to enforce the contracts against the citizens of the state, the door will be left wide open for them to do such business and never bear any of the burdens that domestic corporations have to bear, unless they need the aid of the courts, and that a construction of the statute which would enable foreign corporations to so do would not only fail to place such foreign corporations upon an equality with domestic corporations and enable them to avoid payment of the incorporating taxes and fees and thus defraud the state, but if the corporation broke the contract and the citizen sought to enforce it, the foreign corporation would not then comply with the laws of the state and the citizen would have to go to the domicile of the foreign corporation in order to sue it.

It was to prevent the happening of such a contingency that the statute in question was, principally, enacted.

The statute prohibits foreign corporations from doing business in this state without first having complied with the law. Such a prohibition is as effective to make a contract entered into by such foreign corporation in this state void as if the statute had in terms declared such contracts to be void. The general rule of law is that where an act is prohibited or declared unlawful [424] it is not necessary for the law to declare the act or contract void. An unlawful act is itself void. This has been the rule of law in this state ever since the decision of this court in Downing v. Ringer, 7 Mo. 585. That was an action upon a note given for the purchase of a town lot. The plat laws of this state provided, that if any person sell or offer for sale any lot before the map or plat of the town, village or addition be made out, acknowledged and recorded, such person shall forfeit a sum not exceeding three hundred dollars for every lot he shall sell or offer to sell. The question of the validity of the note was the point at issue in that case, and this court, speaking through Napton, J., said: "It was formerly doubted in England, whether an agreement which merely inflicted a penalty for doing the act; but in Bartlett v. Vinor (Carth. 252; Chitty on Contracts, 230), Lord Holt said: 'Every contract made for or about any matter or thing which is prohibited, and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter; because, a penalty implies a prohibition, though there are no prohibiting words in the statute.' This is the established modern doctrine, and the distinction between mala prohibita and mala in se, is discarded: Chitty on Contracts, 232. The cases in this country are uniform in declaring the principle, that if a note or other contract be made in consideration of an act forbidden by law, it is absolutely void, and the illegality of the contract will constitute a good defense at law, as well as equity: 2 Kent's Commentaries, 466. The penalty inflicted by the act concerning plats of towns and villages implies a prohibition against the sale of lots before the requirements of the act are complied with, and the courts will not enforce a contract entered into against the spirit and policy of the statute." Accordingly, the note was declared absolutely void.

This case was expressly cited and followed in Mason [425] v. Pitt, 21 Mo. 393; State v. Dallas County Court, 72 Mo. 331, Rollins v. McIntire, 87 Mo. 505; Cherokee Strip Live Stock Assn. v. Cass Land Cattle Co., 138 Mo. 406, 40 S. W. 107 (in which it was further said: "The cases in this country are uniform in holding that a contract forbidden by statute is void, and the general rule is, that no action or suit can be maintained either at law or equity upon such a contract, even where the statute does not expressly declare them void"); and in St. Louis Fair Assn. v. Carmody, 151 Mo. 573, 74 Am. St. Rep. 571, 52 S. W. 365 (in which it was said: "It makes no difference how fair the contract may be on its face, or how innocent in its own isolated terms, if it is designed to encourage an object forbidden by law, the courts will have nothing to do with it").

These considerations necessarily lead to the conclusion that foreign corporations doing business in this state must comply with the laws of this state, and that contracts entered into by such corporations, in this state, before complying with the laws of this state, are void and cannot be enforced in the courts of this state. Contracts entered into by foreign corporations in the states of their domicile, with citizens of this state, where valid according to the law of the state of their domicile and not prohibited by the laws of this state, are valid contracts and will be enforced in this state as a matter of comity, and such corporations are not required to comply with the statutes cited in order to maintain such actions. In other words, the statute was not intended to affect such cases, nor to change the rules of comity that have always been observed by the courts of the several states. The statute is leveled at and confined to foreign corporations that transact business in this state, and the asking the aid of the courts to enforce contracts that relate to legitimate business done in other states and that is not prohibited by the laws of this state, does not constitute doing or transacting business in this state within the meaning of the [426] statute. This conclusion is accentuated by the language of the statute itself, for section 1026 of the Revised Statutes of 1899 exempts "'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident." It would be a solecism to construe the statute so as to allow such contracts to be made in this state by "drummers" for corporations that had never complied with the statute, but to

require them to comply with the statute if they had to ask the aid of the courts to enforce them.

The case of Trower Bros. Co. v. Hamilton, 179 Mo. 205, 77 S. W. 1081, comes within the rule of comity spoken of. And the case of Carson-Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, so far as the facts in judgment are shown by the opinion, also falls within the same rule. But the case at bar is very different, for here the foreign corporation was unquestionably transacting business in this state within the meaning of the statute. This is the only construction of the statute which will give full force to all the provisions of the statute, and it is likewise the only construction of the statute which will place such foreign corporations that do business in this state or make contracts in this state on an equality with domestic corporations, and which will enable the people of this state to secure the aid of the courts of this state when such foreign corporations are guilty of a breach of such contracts. These principles applied to the case at bar necessarily lead to the conclusion that the judgment of the circuit court is right, and it is, therefore, affirmed.

All concur, except Brace, P. J., absent.

The Right of a Foreign Corporation to maintain an action in the courts of a state with whose laws it has not complied, is considered in Garratt Ford Co. v. Vermont Mfg. Co., 20 R. I. 187, 78 Am. St. Rep. 852, and cases cited in the cross-reference note thereto. If a statute requires foreign corporations to do certain acts, and provides that if they refuse, they shall not maintain any action in the state, it has been held that the doing of those acts, though not within the time prescribed by the statute, authorizes the corporation to proceed with the prosecution of an action previously pending: Buffalo Zinc etc. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87.

BONSAL v. RANDALL.

[192 Mo. 525, 91 S. W. 475.]

DEED—Undue Influence of Nurse and Daughter.—Where a daughter keeps house for her aged father, and during his sickness ministers to his wants as an affectionate and dutiful child, rather than as a nurse, no presumption arises that his deed to her is obtained by undue influence. (p. 531.)

Frank L. Farlow, for the appellant.

Thomas Dolan, for the respondent.

[527] GANTT, J. This is an appeal from the decree of the circuit court of Jasper county, dismissing a bill in equity brought by the plaintiff against the defendant, [528] Kate B. Randall, to set aside a deed made by Vincent P. Bonsal to Kate Randall to the north half of lot No. 11, and thirty-seven and a half feet off of the south side of lot No. 10, in Patton's addition to the town of Murphyburg, now known as the city of Joplin, which said deed was executed on the 29th of April, 1899.

It is alleged in the petition that the plaintiff is a son of said Vincent P. Bonsal, deceased, and that the defendants Kate B. Randall and J. R. Randall are husband and wife, and that the said Kate Randall is a daughter of the said Vincent P. Bonsal, deceased, and that the defendant Guy D. Randall is a son of Mae Randall, deceased, who was a daughter of the said Vincent P. Bonsal; that Mae Randall departed this life prior to the death of her father; that Vincent P. Bonsal died July 3, 1900, and at the time of his death was and for many years had been a resident of Jasper county; that the defendant Kate Randall was married to J. R. Randall, who is the father of the defendant Guy Randall, since the death of her father; that the defendant Guy Randall is a minor thirteen years of age. Plaintiff states that he, the said plaintiff, and the defendants, Kate Randall and Guy Randall, are the only heirs at law of the said Vincent P. Bonsal, deceased; that on the twenty-ninth day of April, 1899, the said Vincent P. Bonsal was the owner in fee simple of the above real estate and on that day made a deed of all of said property to the defendant Kate Randall, by her then maiden name, Kate Bonsal, and the said deed was duly recorded in the deed records of Jasper county on the third

day of May, 1899, in book 146, page 243; that at the time of the making of the said deed, the said Kate Randall was living with her father upon the said real estate and so continued to live until the day of his death, July 3, 1900; that at the time of the making of the said deed, the said Vincent P. Bonsal was more than seventy-five years old and afflicted with disease and ailments, partially paralyzed, [529] and by reason of his great age and infirmities completely helpless and wholly dependent on others for the common comforts of life, and was so demented and enfeebled in body and mind as to render him incapable of free, independent and rational volition; that from long residing with and from the habit of being managed and controlled by the said Kate Randall, the said Vincent Bonsal had become subject to her will and was incapable of resisting her instructions; that the relation of patient and nurse existed between them; that the said deed was without any consideration, and the consideration named therein was grossly inadequate. Wherefore, plaintiff prayed that the said conveyance be set aside and held for naught, and that the title to his portion of said real estate should be vested in plaintiff.

The defendant Mrs. Randall, in her answer, denied each and every allegation therein contained, except that she was a sister of the plaintiff, the death of her father at the time set forth in the plaintiff's petition, and the conveyance of the property from her father to her. She alleged that said conveyance was for a valuable consideration; that said consideration was services rendered by her by keeping house for him and taking care of him as long as he lived.

The minor defendant, Guy Randall, answered by his guardian ad litem, W. J. Owen, and asserted his title to the undivided one-third in the said lot. The cause was tried at the June term, 1902, on the 25th of August, and resulted in a decree for the defendant, dismissing plaintiff's bill.

The testimony discloses that Vincent P. Bonsal, deceased, was the father of four children, the plaintiff, Isaac Bonsal, and another son Vincent and two daughters, Kate and Mae. Vincent and Mae both died before their father. Mae had intermarried with J. R. Randall and left one child, the defendant Guy B. Randall. Vincent P. Bonsal's wife died sometime prior to the year [530] 1899. The plaintiff Isaac had left home and gone in business for himself and was the proprietor of and conducting a foundry at Oronogo in Jasper

county. The defendant Kate Randall, at that time Miss Kate Bonsal, taught school and kept house for her father. About the fifteenth day of April, 1899, Vincent P. Bonsal was stricken with paralysis, and died in the month of July, 1900. He was about seventy years of age at the time of his death, and according to all of the witnesses who knew him, he was a man of strong mind and character. He was on good terms with all of his children and grandchildren. As already said, he was the owner of the lot over which this litigation has arisen. At the time he was taken sick, he also had from three hundred and fifty to four hundred dollars in bank to his credit. It appears that for some time before he was stricken he had expressed his intention of deeding the homestead to his daughter Kate, saying that his son was well established in business, and his daughter would have to care for him and had done more for the family than any other of the children, and he thought she ought to have the lot, because a woman had a hard time to make a living in this world; that while she was now teaching school, he did not know how soon her health might fail. With the exception of two witnesses for the plaintiff, one who acted as a nurse for something like a month for the old gentleman after he was stricken with paralysis, and another who had very little acquaintance with him, all the testimony tended to show that Vincent P. Bonsal's mind was just as good and strong three or four days after he had his partial stroke of paralysis on the 15th of April, 1899, as it ever had been. Both of the physicians who attended him at the time, and business men and friends who had known him for years, and had been his intimate personal friends, all agree that his mind was apparently as good after the stroke as it was before. The witness Shy, who acted as nurse but had had no acquaintance with him before he was taken sick, testified [531] that in his opinion Mr. Bonsal did not understand what he was doing when he made the deed. The only facts, however, upon which he based his conclusion were that he heard him say that he would starve to death, and on another occasion showed a great loss of memory; that Mr. Price had been in to see him, and a few minutes after Price had left, Mr. Bonsal said he did not see why Price did not come to see him, and when told that Price had just left only a few minutes before, he denied it. In striking contradiction of Shy's evidence, however, the physician testified that he tested Mr. Bonsal's memory especially, and that he

recalled facts and circumstances of conversations of several days before with great clearness, and that he discovered no lack of memory whatever in him. But without reproducing the evidence in detail, it is sufficient to say that the testimony overwhelmingly established that Mr. Bonsal was capable of making and understanding the nature of the conveyance which he made to his daughter of this lot. When the notary public brought the deed to him to be executed, he refused positively to sign it until the clause reserving to him a life estate in the property was inserted in the deed.

Plaintiff seeks to recover in this case on the ground that the deed was obtained by undue influence. There is not a word of testimony in the case that tends to support the charge that Mrs. Randall obtained the deed by any actual undue influence or over-persuasion, but the plaintiff relied upon a presumption of undue influence on account of the relationship of Mrs. Randall to her father of patient and nurse, and insists that the burden is upon Mrs. Randall to rebut this presumption and to show that the transaction was fair beyond the reach of suspicion. It is clear to us that Mrs. Randall did not bear the relation of nurse to her father in the sense in which the doctrine invoked by the plaintiff has been applied by courts of equity. It is true that Mrs. Randall kept house for her father, nursed him, [532] and ministered to his wants when he was sick, but she did this, not in the capacity of a hired nurse, but as an affectionate and dutiful daughter, and in such case her acts of kindness raise no presumption against the validity of the deed.

This court, in Hamilton v. Armstrong, 120 Mo. 519, 29 S. W. 545, said: "The assumption that Mrs. Bates and Mrs. McLain bore a confidential relation to their uncle, John Hamilton, from which undue influence might be presumed, merely because they were his nieces, and the naturel esteem and affection which should characterize that relation existed between him and them, unaffected by any other relationship, cannot be maintained either by reason or on authority." And in that case, this court quoted with approval the language of Judge Macfarlane in Maddox v. Maddox, 114 Mo. 35, 35 Am. St. Rep. 734, 21 S. W. 499: "We hope it will never be that the visits of a son to an aged and infirm father will be looked upon with suspicion and attributed to a selfish motive." In Doherty v. Noble, 138 Mo. 25, 39 S. W. 458, it was said: "There is no presumption against a voluntary con-

veyance from parent to child. The burden properly rested upon the plaintiff to prove the exercise of some undue influence by defendant over plaintiff by which the deed was secured."

We might add numerous other cases in this state to the same effect, but we deem it entirely unnecessary to cite further precedents as to the law of this state on this proposition. There was nothing in the relation of father and daughter in the circumstances of this case upon which to base any presumption of undue influence or over-persuasion of the father by the daughter. In making the deed to her, he simply carried out an intention which he had often expressed before he was afflicted. He knew that he would be unable in all probability to take care of himself the remainder of his life, and he saw fit, and it was his right, to provide for himself by deeding the lot to his daughter who had already given every evidence of her affection for him. [533] The property was his and he had a perfect right to dispose of it to suit himself. The circuit judge who saw the witnesses and heard them testify, and lived in the same city with them, found that there was no undue influence in procuring the deed, and we fully concur in the conclusion which he reached. Accordingly the judgment of the circuit court is affirmed.

Burgess, P. J., and Fox, J., concur.

Undue Influence as affecting the validity of wills is discussed in the monographic note to In re Hess' Will, 31 Am. St. Rep. 670-691. Presumption of undue influence is the subject of a monographic note to Richmond's Appeal, 21 Am. St. Rep. 94-104. Ordinarily, when a will is contested on the ground of undue influence, the burden of proof rests upon the contestant to establish such influence: Compher v. Browning, 219 Ill. 429, 109 Am. St. Rep. 346; Dausman v. Rankin, 189 Mo. 677, 107 Am. St. Rep. 391. It has been said, however, that when a confidential relation is shown to have existed between a testator and the recipient of his bounty, his influence is presumed to have induced the gift: Maddox v. Maddox, 114 Mo. 35, 35 Am. St. Rep. 734. This would clearly be a very unsafe doctrine to follow in all cases: Goodbar v. Lidikey, 136 Ind. 1, 43 Am. St. Rep. 296; Bancroft v. Otis, 91 Ala. 279, 24 Am. St. Rep. 904; Malloy v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

ZNAMANACEK v. JELINEK.

[69 Neb. 110, 95 N. W. 28.]

VENDOR AND PURCHASER—Servitude in Favor of Vendor. If the owner of adjoining tracts sells one of them, or if an owner of an entire estate sells a portion thereof, the purchaser takes the tract or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. (p. 534.)

EASEMENTS by Parol.—A parol grant of an easement upon a valid consideration, certain in its terms, and with such performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds, will be upheld. (p. 535.)

EASEMENT by Parol.—A parol grant of an easement may rest in implication. (p. 535.)

VENDOR AND PURCHASER—Servitude in Favor of Vendor. If the owner of two adjoining tracts of land constructs a permanent dam across a stream on one of them, thereby causing the water to overflow a portion of the other, and then sells the latter tract to one having knowledge of the dam and its character, there arises an implied contract that the mutual benefits and servitudes arising from the existence of such dam shall remain in statu quo. (p. 535.)

F. I. Foss, B. V. Kohout and J. A. Wild, for the plaintiff in error.

A. R. Scott and G. H. Hastings, for the defendant in error.

111 ALBERT, C. This is an action for damages, alleged to have been sustained by the plaintiff on account of a dam constructed by the defendant across a stream of water, whereby the water was thrown back on the lands of the plaintiff. A trial to the court, without a jury, resulted in a general

finding for the defendant and judgment was given accordingly. The plaintiff brings error.

It is conclusively established that in 1882 the defendant was the owner of two quarter sections of land, adjoining each other, one of which we shall call the east, the other the west, quarter. A small stream of water flowed from the west quarter through the east quarter. In that year the defendant constructed a dam across the stream on the east quarter, which threw the water back upon a portion of the west quarter, and, with the exception of a short time when it was destroyed by flood, has ever since maintained the dam at that place. In 1891 he conveyed the west quarter to the plaintiff by warranty deed. At the time of the conveyance, the dam was in existence and its existence and condition were known to the plaintiff. The evidence is sufficient to warrant a finding that the dam was a permanent structure; that the parties so regarded it at the time of the conveyance is clearly shown by the fact that its existence and probable effect on the land was discussed to some extent by them at that time. Whether the dam, since it was first constructed, had always been maintained at the same height that it was at the time the alleged damages were sustained, was one of the issues submitted to the trial court upon conflicting evidence. The trial court by its general finding resolved that question in favor of the defendant. The findings in that regard are amply sustained by the evidence; so it stands as one of the established facts in the case that the dam at no time has been maintained at a greater height than when first constructed, when the conveyance, hereinbefore mentioned, was made to the plaintiff.

[112] The foregoing facts, we think, bring the case within the rule announced in Lampman v. Milks, 21 N. Y. 505, and approved by this court in Fremont etc. R. Co. v. Gayton, 67 Neb. 263, 93 N. W. 163, which is as follows: "Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains."

The plaintiff contends that the defendant could have no easement in the west quarter while both quarters belonged to him, because one cannot have an easement in his own land; that he did not acquire an easement by prescription

after he had parted with the land, because this action was brought within less than ten years from the date of the conveyance of the west quarter to the plaintiff, and that there is no evidence of any express or implied grant; consequently, the easement is not established.

It has been held by this court that a parol grant of an easement will be upheld where there has been a valid consideration and the grant is certain in its terms, and there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds: Gilmore v. Armstrong, 48 Neb. 92, 66 N. W. 998. While that was what is technically called a suit in equity, yet as equity and law are administered by the same courts in this state, there is no reason why the defendant, in an action of this character, may not interpose as an equitable defense a parol grant of an easement. A parol grant of an easement, like any other contract, may rest in implication, as in Lampman v. Milks, 21 N. Y. 505, where the owner of land, across which a stream flowed, diverted the stream so as to relieve a portion of the land which had formerly been overflowed, and it was held that the parties, under such circumstances, are presumed to contract with reference to the condition of the property at the time of the conveyance. In other words, under [113] such circumstances, the law implies a contract, mutually binding on the parties, that the mutual privileges and servitudes of the two tenements, as then obviously existing, shall remain in statu quo. Such agreement cannot be said to be without consideration, because it is a part of the principal contract, evidenced by the conveyance, and is relieved of all uncertainty by the obvious character of the easement.

But the plaintiff contends that the presumption, arising in favor of the existence of the easement, is rebutted by the testimony in this case. The testimony of plaintiff on this point is as follows:

"Q. When you bought this land in 1891, you went down to see the dam, did you not? A. No, I did not. We talked about the dam.

"Q. What did you talk about the dam? A. I talked about the dam. Jelinek tried to sell me the land. I did not talk much with him about it, only he told me there was a dam there.

"Q. Don't you recall the fact that Jelinek said that he wanted to take out the pond? A. I spoke about the water on the land. I said I did not like the water stand on the land. He said he would like to buy it. I tell him if he buy it of me he could keep it.

"Q. That was at the time he made the deed? A. Yes, sir, but before, when I was ready to buy it.

"Q. Don't you remember of saying to Jelinek when this deed was made, when he said, 'I will measure out the overflow, will not make you a deed for that, and will take that out of the purchase price,' and you said, 'I don't want it that way; it would be like a coat that you might have made with a piece cut out of the back? A. Yes, sir."

Defendant testified:

"Q. Was this dam talked over between you and Znamanacek at or before you sold him the land? A. Yes, sir.

"Q. What was said? [114] A. Well, he say he would buy that piece of land; he see that water there; he say he wants that water there, that is the way he put it. I say I measure it to see how much it flood over, as I did not want him to pay me for it; he say if he buy that piece of land with that piece out it would be like buying a coat with a piece cut out of the back of it.

"Q. When you had this talk with Znamanacek about buying back a portion of that property he said he did not want to cut any of it out? A. No, he did not want to cut out any.

"Q. When you sold it to him he paid you for the whole of it, did he not? A. I told him I did not damage the land any. He said he want that whole piece of land.

"Q. He wanted the whole of it? A. Yes, sir, and he wanted that water too."

The testimony of the defendant is corroborated by that of his wife. This evidence, instead of rebutting the presumption, seems to us to strengthen it. The testimony of the plaintiff is not quite clear, but that of the defendant, corroborated by that of his wife, shows clearly that the parties, at the time of the conveyance, understood that the dam was a permanent structure, and that it would be maintained in the future. We think the case falls squarely within the rule announced in the case hereinbefore cited. It follows, therefore, that the judgment of the district court is right, and we recommend that it be affirmed.

Barnes and Glanville, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

For Authorities Bearing upon the principal case, see the monographic note to Scott v. Moore, 81 Am. St. Rep. 768-770.

FOLSOM v. PERU PLOW AND IMPLEMENT COMPANY.

[69 Neb. 316, 95 N. W. 635.]

CHATTEL MORTGAGES—Failure to Record—Effect on Creditors.—The term "creditors" as used in a statute making an unrecorded chattel mortgage void as to creditors where the mortgagor retains possession of the property, applies only to such creditors as by legal process have fastened a lien or charge upon the property for the satisfaction of their debts. (p. 539.)

CHATTEL MORTGAGES—Death of Mortgagor—Rights of Creditors.—The term "creditors" as used in a statute making an unrecorded chattel mortgage void as to creditors where the mortgagor retains possession of the property, applies only to such creditors as have acquired a lien upon the property while in possession of the mortgagor and before the filing of the mortgage for record, and if the mortgagor in an unrecorded chattel mortgage dies in possession of the mortgaged property, such mortgage is void only as to those creditors whose claims have been adjudicated and allowed before the mortgage was filed for record, and before the mortgagee had reduced the property to his possession, and an administrator, as representative of the creditors of the deceased mortgagor, can invoke the statute only in aid of such creditors as have had their claims adjudicated and allowed. (p. 540.)

T. B. Wilson and Sawyer & Snell, for the plaintiff in error.

T. H. Woods, for the defendant in error.

317 ALBERT, C. In March, 1900, one Adam Berkheimer executed an instrument, which the parties hereto have seen fit to treat as a chattel mortgage on certain farming implements, to secure a bona fide indebtedness; the mortgagor retained possession of the property. In November of the same year the mortgagor died, and on the fifth day of the following December, C. N. Folsom was appointed administrator of the estate, and, as such administrator, took possession of the mortgaged property. The mortgage was not filed for record until the twenty-ninth day of March, 1901, after the administrator had taken possession of the property. After filing the mortgage for record, the mortgagor brought

this action against the administrator for possession of the mortgaged property, basing his claim thereto on the chattel mortgage, the debt thereby secured remaining unpaid.

A trial was had to the court without a jury, which resulted in a finding and judgment for the plaintiff. The defendant brings error.

The defendant contends that as administrator he represents the creditors of the estate, and that the chattel mortgage, not having been filed before his appointment, and before he had taken possession of the property, was void as to him as representative of such creditors. This contention is based on section 14, chapter 32 of the Compiled Statutes (Annotated Statutes, 5963), which so far as is material is as follows: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgagor, and as against subsequent [318] purchasers and mortgagees, in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides, or in case he is a nonresident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage, and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid, as if the same were fully spread at large upon the records of the county."

The case of Becker v. Anderson, 11 Neb. 493, 9 N. W. 640, would seem to support the defendant's position. It was there held that an unrecorded chattel mortgage, being void as to creditors, the mortgaged property became assets in the hands of the executor for the payment of debts of the estate. The decision in that case is based on Kilbourne v. Fay, 29 Ohio St. 264, 23 Am. Rep. 741, where it was held that an unrecorded chattel mortgage, where the mortgagor died in possession of the property, leaving an insolvent estate, was void as to creditors of the estate, and the mortgaged property became assets in the hands of the executor for the payment of the debts of the estate. Some doubt is thrown on

both these cases by the criticism indulged in Lancaster County Bank v. Gillilan, 49 Neb. 165, 68 N. W. 352. But in neither of those cases was the precise question involved in this case necessary to a decision. In both those cases it was shown that there were creditors of the estate, and that the estate was insolvent. In this case it is not shown that there are any creditors of the estate save the plaintiff in this case. It is true the evidence shows that the administrator presented a petition to the county court, wherein he alleged that, in his opinion, a sale of the personal property would be necessary to pay the debts of the estate, and that the estate was insolvent, and that the county court found, in passing on the petition, that the estate was probably insolvent. But such allegations and findings do not, in our opinion, [319] show the fact that there were any creditors of the estate, within the meaning of the section above quoted. It has been repeatedly held by this court that the term "creditors," as used in that section, applies only to such as, by legal process, have fastened a lien or charge upon the property for the satisfaction of their debts, and not to general creditors: Forrester & Co. v. Kearney Nat. Bank, 49 Neb. 655, 68 N. W. 1059; National Bank of Commerce v. Bryden, 59 Neb. 75, 80 N. W. 276; Fitzgerald v. Andrews, 15 Neb. 52, 17 N. W. 370. The cases just cited would seem to imply that such lien or charge could be acquired only by the levy of an attachment or execution. But the principle underlying those cases is, we think, that a mortgage is void as against creditors who, by legal process, have acquired a specific lien upon the property for the satisfaction of their debts. But we do not think such liens are acquired by the mere appointment of an administrator, nor by his possession of the property. It may be conceded that he takes the property as trustee and holds it in trust for the benefit of the creditors of the estate, as well as for the benefit of all other persons interested in the estate. But that does not charge the property with a specific lien in favor of any creditor. The administrator, as representative or trustee of the creditors, certainly occupies no more advantageous position, with reference to the property, than the creditors themselves. The relation of a creditor to the assets of the estate, before his claim has been proved and allowed, is analogous to that of a general creditor to the property of his debtor before he has levied upon it under an attachment or execution. In neither case is he in a position to assail a

conveyance of the property on the ground that it was made in fraud of his rights. In O'Connor v. Boylan, 49 Mich. 209, 13 N. W. 519, it was held that claims against the estate must be adjudicated before they become such a charge against it as would warrant the creditor in filing a bill to set aside a conveyance made by the testator in fraud of his creditors. To the same effect is Ohm v. Superior Court, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244, which [320] was followed in Field v. Andrada, 106 Cal. 107, 39 Pac. 323.

The principle underlying these cases is, that a general creditor of an estate has no lien on the assets until his claim has been adjudicated and allowed. If that be true, and we have no doubt of it, and if, as repeatedly held by this court, the term "creditors" in the section of the statute quoted applies only to such as have acquired a lien upon the property while in possession of the mortgagor and before the filing of the mortgage for record, then there is no escape from the conclusion that an unrecorded chattel mortgage, where the mortgagor dies in possession of the mortgaged property, is void only as to those creditors whose claims had been adjudicated and allowed before the mortgage was filed for record and before the mortgagee had reduced the property to his possession, and that an administrator, as the representative of the creditors, can invoke said section only in behalf of those creditors whose claims have been thus allowed. It not having been shown that there are any such creditors in this case, it follows that the administrator is not in a position to assail the chattel mortgage, and that the judgment of the district court is right.

We therefore recommend that the judgment of the district court be affirmed.

Barnes and Glanville, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A Creditor Who may Assail a Chattel Mortgage as void for want of recordation, is not a mere general creditor, but one who, by attachment or otherwise, has secured a lien: Union Nat. Bank v. Oium, 3 N. Dak. 193, 44 Am. St. Rep. 533.

FIRST NATIONAL BANK OF PAWNEE CITY v. AVERY PLANTER COMPANY.

[69 Neb. 329, 95 N. W. 622.]

ATTACHMENT—Successive Writs—Sale—Action for Restitution.—If writs of attachment are issued in separate suits of several creditors against a common debtor, and successively levied on the same property, and motions to dissolve such attachments are overruled and the actions prosecuted to final judgment, and, from the order sustaining the first attachment and final judgment an appeal is taken, on which the order is reversed and the final judgment is affirmed, no appeal being taken from the order sustaining the other attachments, and if, pending the appeal, the property attached, by stipulation of the parties, is sold to the first attaching creditor, under an order of sale issued on his judgment, and the proceeds applied thereon, the other judgments remaining wholly unsatisfied, an action for restitution will not lie against the first, in favor of the subsequent attaching creditors, but they may maintain an action for money had and received, to which the first attaching creditor may interpose a counterclaim or setoff, and in such case the statute of limitations does not begin to run until the first attachment was dissolved. (pp. 546, 547.)

ATTACHMENT — Joint Tort-feasors.—The seizure of the goods of a third person by the sheriff under an order of attachment is tortious, and attaching creditors joining with the sheriff in resisting an action brought by such third person to recover the goods become trespassers ab initio, and jointly and severally liable for a money judgment, rendered therein in favor of such third persons. (p. 547.)

CONTRIBUTION—Joint Tort-feasors.—If a money judgment against attaching creditors as joint tort-feasors has been satisfied by one of them, contribution will be enforced if it appears that they acted in good faith without any intention of committing a trespass, and the basis of contribution in such case is the ratio the claims of the several attaching creditors bear to each other. (p. 548.)

ESTOPPEL—Defect of Parties.—A plaintiff cannot complain of a defect of parties in a counterclaim, if the record shows that the omitted party, who was also omitted by him, is equally necessary to a determination of his own cause of action. (p. 549.)

A. S. Storey and R. W. Storey, for the plaintiff in error.

H. C. Lindsay, E. L. Fulton and J. B. Raper, for the defendant in error.

330 DUFFIE, C. On the sixteenth day of February, 1895, a firm having sixty-five creditors, and with the knowledge and consent of all but three of them, made and filed a chattel mortgage on all its personal property to secure the amount due each of its creditors. Afterward, three of the creditors, namely, the Avery Planter Company, which we shall hereafter call the plaintiff, the First National Bank of Pawnee City, which we shall hereafter call the defendant, and Maggie

Wishard, being among the number without whose knowledge or consent the mortgage was given, brought separate actions against the firm, and caused attachments to be levied on the personal property covered by the chattel mortgage and on certain real estate belonging to the firm. The defendant's attachment for four thousand two hundred and eighty-three dollars and eighty-six cents was levied first, that of Maggie Wishard for one hundred and fifty-two dollars and ten cents was next in point of time, that of the plaintiff for two hundred and seventy-one dollars and forty-four cents was levied last. Motions, all based on the same ground, were made to dissolve
331 these attachments, were heard on the same evidence and were overruled. A judgment was rendered and an order for the sale of the attached property made in each case in favor of the plaintiffs in attachment. Error was prosecuted from the judgment in favor of the defendant in this case to this court, where the order sustaining the attachment was reversed and the attachment dissolved, but the judgment on the merits affirmed. Neither the order of the district court sustaining the attachment nor its judgment on the merits was stayed by a supersedeas. The case is reported under the title of Skinner v. First Nat. Bank of Pawnee City, 59 Neb. 17, 80 N. W. 42.

After the actions in attachment were begun, and before the writs were levied, the attaching creditors, in anticipation of a claim to the personal property by some of the mortgagees, each gave the sheriff an indemnifying bond to hold him harmless from any damages that might result to him by reason of a levy of the attachments on the property in question. After the attachments were levied certain of the mortgagees brought an action in replevin against the sheriff to recover possession of the mortgaged property. The property was not delivered to the plaintiffs in that action and the case proceeded as one for damages. All of the attaching creditors joined in the defense of that action, although they were not parties to the record. The action in replevin resulted in a judgment in favor of the mortgagees and against the sheriff for four thousand and eighty-nine dollars and eighty-seven cents and costs of suit. The sheriff prosecuted error to this court where the judgment was affirmed: Sloan v. Thomas Mfg. Co., 58 Neb. 713, 79 N. W. 728. In resisting the action in replevin the attaching creditors acted in good faith and in the honest belief that the sheriff was entitled to

the possession of the property, as against the mortgagees, by virtue of the attachments, and that the property was liable for the satisfaction of their respective claims, but not in pursuance of any agreement between them.

While the case last cited, and that of Skinner v. First Nat. Bank of Pawnee City, 59 Neb. 17, 80 N. W. 42, were pending in this [332] court, by stipulation of all the parties to the attachment cases, the sheriff was appointed receiver of the personal property and advertised and sold the same, reporting his proceedings to the district court where his report was confirmed. He was then directed by the court to hold the proceeds pending the result of the action in replevin. The real estate was sold by the sheriff, pending said action, under an ordinary order of sale issued in favor of the bank, and the proceeds, amounting to five hundred and five dollars, applied on its judgment. The defendant was the purchaser at such sale, and afterward, and before the commencement of this action, conveyed the land to a stranger. After the defendant's attachment had been dissolved, by virtue of the decision of this court in Skinner v. First Nat. Bank of Pawnee City, 59 Neb. 17, 80 N. W. 42, certain of the mortgagees who had been excluded from sharing in the judgment in replevin because they did not accept the mortgage until after the levy of the attachment, commenced an action in equity to share in the proceeds of the judgment in replevin. In this action the sheriff was ordered to apply the proceeds in his hands, as receiver of the personal property, on the judgment in replevin, which was done. Such proceeds were not sufficient to satisfy the judgment, and the defendant paid the deficiency, amounting to seventeen hundred and three dollars and thirty cents, and, in addition thereto, some costs and expenses incurred in the action in replevin, making a total of eighteen hundred and seventy-two dollars and eight cents.

Afterward, and after the dissolution of the defendant's attachment, the plaintiff brought this action against the defendant for restitution to the extent of its judgmen, out of the money which the defendant had realized on its judgment by a sale of the real estate before its attachment was dissolved. The defendant pleaded a counterclaim for contribution for the amount paid by it on the judgment in replevin, and certain costs and disbursements incurred and made by it in that action.

Portions of the answer containing, among other things, allegations showing the good faith of the attaching creditors, in directing their levies, and in resisting the action in [333] replevin, were stricken out on motion of the plaintiff. The plaintiff then demurred to the counterclaim on the grounds that the facts stated were not sufficient to constitute a cause of action in favor of the defendants, and that there was a defect of parties, because Maggie Wishard was a necessary party to a determination of the issues tendered by the counterclaim. The demurrer was sustained. A trial resulted in a finding and judgment for the plaintiff. The defendant brings error.

Numerous errors are assigned and argued, but they render themselves into two questions, namely, whether on the facts stated the plaintiff has a cause of action against the defendant, and whether, on the same state of facts, the defendant has a cause of action against the plaintiff for contribution. We shall consider these questions in their order. The case has been argued on the assumption that it is one for restitution.

In Hier v. Anheuser-Busch Brewing Assn., 60 Neb. 320, 83 N. W. 77, it was held that a setoff would not be allowed in an action for restitution; the reason being that the court having, through a mistaken view of the law, wrongfully taken the property of one and given it to another, would not seek to adjust equities between them until it had restored the party injured to the position he occupied before the wrongful order of the court was enforced against him. The right of the defendant to ask contribution against the plaintiff and to enforce it in this case rests, therefore, upon the question whether this action is one of restitution or for money had and received and for which the common-law action of assumpsit could be maintained.

While this is termed an action of restitution, I have grave doubt if such is really its character, as restitution, properly speaking, is made only to a defendant whose money or property has been taken from him by the erroneous order of a court and is not available to third parties: Garr v. Martin, 20 N. Y. 306. In this case three parties, the bank, Maggie Wishard and the Avery Planter Company, procured to be issued and levied upon the real estate [334] in question attachments in the order above named. According to priority of levy the bank had the first lien, Miss Wishard the second, and the Avery Planter Company the third. These attachments were

all based on the same grounds and, in a motion made to dissolve them, the same evidence was taken and relied on by the defendant in support of his motion to dissolve, while the three attaching plaintiffs each used the same evidence to sustain their writs. The district court sustained the attachments, gave judgment in each case for the amount of the plaintiffs' respective claims, and ordered a sale of the attached property. The defendant in these actions took error to this court in one case only, that of the bank, where the judgment on the merits was affirmed, but the order of the district court sustaining the attachment was overruled and the attachment dissolved: Skinner v. First Nat. Bank of Pawnee City, 59 Neb. 17, 80 N. W. 42. In the meantime the defendant having failed to give a supersedeas bond, the bank sold the attached real estate, being itself the purchaser, for the sum of five hundred and five dollars, which was applied on its judgment. In this condition of the case this action was commenced against the bank by the Avery Planter Company, which asserts that the attachment of the bank having been dissolved, its claim to a first lien was thereby devested, while the lien of Miss Wishard was advanced to a first lien and that of the company to second place, entitling these parties to the value of the property which the bank had appropriated under its void attachment, and the value of which was sufficient to satisfy the judgments of both Miss Wishard and the company.

If Skinner, the attachment defendant, had brought this action, then, on the authority of Hier v. Anheuser-Busch Brewing Assn., 60 Neb. 320, 83 N. W. 77, it is plain that the bank would be compelled to refund to him the value of the property sold under an attachment held good by the judgment of the district court, but afterward declared by this court to have been illegally issued, and the bank would not be allowed to set off a demand held by it against Skinner to [335] cancel or reduce the amount of his recovery, the theory being that the court will restore to a party money or property taken from him by another under a wrongful order made by the court and place him in the same position he occupied before the illegal order was made.

The Avery Planter Company does not, however, occupy, in this respect, the same position held by the defendant in the attachment proceeding. The court decided no controversy between attaching creditors. It made no decision against the attaching creditors whose writs were levied subsequent to

that of the bank. It took from them no right for which they were contending as against the bank, and unless one has been wrongfully compelled by the court to abandon a position which he was defending, he is not entitled to restitution regardless of the equities of the party against whom he is seeking to enforce such a claim. In this case the lien of the Avery Planter Company was advanced from third to second place, not on account of any action of its own, or of any merit or equities it possessed over the bank, but solely because Skinner, the defendant whom all were pursuing, elected to appeal from the order of the district court sustaining the bank's attachment against his property and having that order reversed. We think that under such conditions the bank is entitled to plead any setoff it may have against the Avery Company.

It is true that in the attitude the case has finally assumed, Miss Wishard and the Avery Planter Company are entitled to the property sold by the bank under what, at the date of the sale, was supposed to be a first lien, and to appropriate that property or its value to the satisfaction of their judgment. This right arises in this way: At the time the property was sold it was held by the sheriff under the three writs sued out by the attaching creditors; the defendant questioned the right of all the creditors to an attachment against him and being defeated in his contention in the district court appealed to this court in the bank case and secured a decision that the writ of the bank was illegally [336] issued. Prior to this decision being made, the sheriff had sold the property for the bank and had, in effect, paid over the proceeds, the bank being the purchaser. When it was finally decided that the property was sold on a void attachment lien, the proceeds of the sale, or the value of the property sold, should have been returned by the bank to the sheriff, who would then hold it for the benefit of the subsequent attaching creditors whose writs had not been set aside. When the bank appropriated this property it knew that its right to do so was being litigated in the supreme court, and the law raised an implied promise on its part to refund the value of the property to the sheriff for the benefit of the other parties for whom he had levied, in case it should finally be determined that the sale was wrongfully made. This implied promise will now be enforced, and the law is well settled that a third party for whose benefit a promise or contract is made may maintain an action in his own name. The action is clearly one for money had and

received, and against which a counterclaim may be pleaded. Miss Wishard and the Avery Planter Company may, therefore maintain an action against the bank for the value of this property.

The defendant contends that plaintiff's cause of action is barred by the statute of limitations. The plain answer to this is that the plaintiff's right to bring this action did not, and could not, accrue until, by the determination of this court, the attachment under which the defendant claimed and came into possession of the money was adjudged invalid, and this was less than four years before the commencement of this action. Defendant also contends that it is entitled to contribution for the amount paid by it on the judgment in replevin, and for certain disbursements made by it in that action. In this view we are disposed to concur. It is true, as urged by the plaintiff, that the mere levy and indorsement of the writs of the plaintiff and the other attaching creditor did not make them joint trespassers with the bank. So far as appears from the record, in directing the levy to be made, the parties acted independently [337] of each other. The levy of each writ, therefore, was a separate trespass, for which the parties participating therein alone were liable. But the parties did not stop there. After notice of the claim of the plaintiffs in replevin they joined in the defense of that action. The result in the action in replevin is conclusive on the point that the possession of the sheriff was tortious. By assisting in the defense of that action the attaching creditors, one and all, ratified the tort and became liable as trespassers ab initio: Cole v. Edwards, 52 Neb. 711, 72 N. W. 1045. The attaching creditors, having thus joined in the defense of the action in replevin, are as effectually concluded by the judgment rendered therein as though they had been parties to the record: 2 Black on Judgments, sec. 539. Such judgment, therefore, was a joint liability, and upon its discharge by one of the parties liable, a cause of action arose in favor of such party against the others for contribution: Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 South. 180; Farrwell v. Becker, 129 Ill. 261, 16 Am. St. Rep. 267, 21 N. E. 792, 6 L. R. A. 400. The general rule that contribution among tort-feasors will not be enforced does not apply where, as in this case, the parties acted in good faith without any intention of committing a trespass: Johnson v. Torpy, 35 Neb. 604, 37 Am. St. Rep. 447, 53 N. W. 575, and the cases last above cited.

On what basis contribution should be enforced is a question of some difficulty. In Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 South. 180, it is held that the parties should contribute equally, without regard to the amount of their respective attachment liens. We cannot assent to that rule. The right to contribution results from natural equity, and its enforcement is an application of the principle that one should be compelled to do that which, in equity and good conscience, he ought to do; that being true, it should be enforced according to the rules of equity, and its enforcement should stop short of the point where it becomes unjust and oppressive. To enforce contribution in the present instance according to the rule under consideration, it seems to us would be manifestly unjust. The attachment lien of the defendant [338] was for four thousand two hundred and eighty-three dollars and eighty cents; that of the plaintiff was for two hundred and seventy-one dollars and forty-four cents; that of the other creditor, one hundred and fifty-two dollars and ten cents. These amounts, respectively, are the measure of the interest of the several attaching creditors in the result of the litigation in the action of replevin. Their joining in the defense of that action was not in pursuance of any agreement, but was merely the result of a desire on the part of each to protect his own lien. It would seem that the case is analogous to that of where the estates of two or more persons are affected by a common encumbrance, which one of them pays. In such case contribution is enforced in proportion to the value of the several estates: Morrison's Admr. v. Beckwith, 4 Mon. (Ky.) 73, 16 Am. Dec. 136. The defense, in the action of replevin, in a certain sense, was a joint venture, and there would seem to be no good reason why the losses should not be apportioned according to the interest of the respective parties in the result, as in other joint ventures. The rule announced in Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 South. 180, to a man of ordinary prudence, situated as was the plaintiff when the action in replevin was brought, would amount to a prohibition against protecting his rights in such action, because the risk, under such rule, would be out of all proportion to all he could hope to gain. We conclude, therefore, that the defendant is entitled to contribution for the amount paid by it in discharge of the judgment, and the reasonable expense incurred in defense of the action; but that the amount should be apportioned

according to the ratio the several attachment liens bear to each other.

It will be observed that the plaintiff demurred to the counterclaim on the ground of a defect of parties, as well as generally. By the general demurrer the facts pleaded in the counterclaim stand admitted. If those facts be true, then the defect of parties, if there be a defect, goes to plaintiff's cause of action as well as that stated in the defendant's counterclaim; the other attaching creditor, if a necessary party to a determination of the counterclaim, is also a necessary party to the cause of action [339] stated in the plaintiff's petition. The plaintiff having omitted a necessary party to the action cannot be heard to complain that such party is a necessary party to a determination of the issues tendered by the counterclaim, and is not before the court. We do not mean to be understood to hold that the other attaching creditor was a necessary party in either case.

It should be noted in this connection that the demurrer to the counterclaim was interposed after the portion of the counterclaim showing good faith on the part of the attaching creditors in making the levy and resisting the action in replevin, had been stricken out on plaintiff's motion. With this matter stricken out, the counterclaim was vulnerable to a demurrer, because it showed nothing to remove the case from the operation of the general rule against the enforcement of contribution between wrongdoers. Technically, therefore, the ruling on the demurrer was right, but the ruling on the motion was erroneous. The motion should have been overruled, and then the counterclaim would have been good as against a general demurrer.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

Ames and Albert, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

The Effect of the Reversal of a Judgment is the subject of a monographic note to Cowdery v. London etc. Bank, 96 Am. St. Rep. 124-146.

The Right of Contribution as between judgment debtors is discussed in the monographic note to Stockwell v. Mutual Life Ins. Co., 98 Am.

St. Rep. 38. The doctrine of contribution is not founded on contract, but on the principle that equality of burden as to a common right is equity; that whenever there is a common right, the burden is also common. The general principle that contribution will not be awarded as between joint wrongdoers is limited to intentional, meditated wrongs, and has no just application when the parties are acting in good faith, in ignorance of facts rendering their acts tortious; and such ignorance is not superinduced by their own fault or negligence: Van Diver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118; Johnson v. Torpy, 35 Neb. 604, 37 Am. St. Rep. 447; Farwell v. Becker, 129 Ill. 261, 16 Am. St. Rep. 267; notes to Carterville v. Cook, 16 Am. St. Rep. 254-256; Kirkwood v. Miller, 73 Am. Dec. 147-149.

DOWNING v. HARTSHORN.

[69 Neb. 364, 95 N. W. 801.]

HOMESTEAD in Life Estate of Husband.—A wife is entitled to claim a homestead in a life estate held by her husband. (p. 551.)

LIFE TENANCY—Payment of Charge on Estate.—If a tenant for life pays a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute, but his right to preserve and enforce the lien exists for the purpose of reimbursement or contribution only, and so far as his estate or interest is concerned, in the absence of intervening interests or special circumstances making such result inequitable, the lien thereon is extinguished, and a subsequent assignment of the whole charge is, in substance, the creation of a new encumbrance. (p. 552.)

CHARGE ON ESTATE—Payment—Preservation of Lien.—A mortgage or other charge upon an entire estate may be kept alive as to the individual estate or interest of the person paying it off by taking an assignment by which he makes his intention manifest, but if the preservation of the lien as to such estate or interest would operate fraudulently or inequitably, it will not be permitted, and the lien will be deemed extinguished so far as it covered, and as to the proportion chargeable upon, the individual estate or interest of the person paying it off, notwithstanding the assignment. (p. 553.)

LIFE TENANCY—Payment of Encumbrance—Homestead.—If a husband holding a life estate in property of a former wife marries again and continues to occupy the premises as a homestead while it is subject to a mortgage, which he pays, taking an assignment, and he subsequently reassigns the mortgage to a third person as security for a new debt, without his wife joining therein, such mortgage is not enforceable against his life estate. (p. 554.)

LIFE TENANCY—Payment of Outstanding Encumbrance and Assignment Thereof—Right of Assignee Against Reversioner.—The rule that a life tenant who buys in an outstanding encumbrance is regarded as holding it for the benefit of the reversioner, as well as for his own benefit, means only that he will not be permitted to acquire by adverse title through such purchase, or otherwise cut out the reversioner's right of contribution, without affording the latter an opportunity to redeem, and such rule does not prevent the life tenant

from assigning the paid-off encumbrance to a third person and its enforcement by him against the reversioner, to the extent of his proportion, or the subjection of the property to the satisfaction of such part of the encumbrance in default of its payment otherwise. (p. 555.)

H. M. Sinclair and J. M. Easterling, for the appellants.

E. C. Calkins, for the appellee.

[365] POUND, C. James H. Bock holds a life estate in the property in controversy as surviving husband of Bertha E. Bock, deceased, the property being a homestead. After her death he continued to reside upon the property with three minor children, who are entitled to the reversion under the statute. He has since married the defendant Jennie Bock, [366] and she has lived upon the property from the date of the marriage. At the time the title was acquired by his first wife it was subject to a mortgage executed by her grantors. Some time subsequent to his second marriage, he paid the remainder due upon the mortgage and took an assignment thereof. Three years later he borrowed money of the plaintiff and assigned the mortgage and the note thereby secured as security for the new loan. The present suit is brought to foreclose the mortgage.

It is clear that the defendant Jennie Bock was, at the time the mortgage was assigned to the plaintiff, and still is, entitled to claim a homestead in the life estate held by her husband: Dennis v. Omaha Nat. Bank, 19 Neb. 675, 28 N. W. 512; Giles v. Miller, 36 Neb. 346, 38 Am. St. Rep. 730, 54 N. W. 551; Kendall v. Powers, 96 Mo. 142, 9 Am. St. Rep. 326, 8 S. W. 793; Deere v. Chapman, 25 Ill. 610, 79 Am. Dec. 350; Beranek v. Berenek, 113 Wis. 272, 89 N. W. 746. The question arises at once, therefore, whether the reassignment to plaintiff amounted to an encumbrance of the homestead within the purview of section 4, chapter 36 of the Compiled Statutes (Annotated Statutes, 6203), as, if such is the case, the mortgage is not enforceable as against the life estate, for the reason that the defendant Jennie Bock did not join in such assignment. It is undoubtedly a general rule that where a tenant for life pays off a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute. Equity will prevent a merger in such cases,

in furtherance of the intention of the person who pays off the mortgage, and will presume an intention to preserve the lien, where manifestly for his benefit and advantage, although he may, in form, have discharged it: 2 Pomeroy's Equity Jurisprudence, sec. 799. But his right to preserve and enforce the lien exists for the purpose of reimbursement or contribution only. He cannot, in the absence of intervening interests or other special circumstances requiring that the lien be kept in force, assert it generally as a charge upon the [367] whole estate, including his estate for life, especially where the result would be unjust or inequitable. In such cases he has no legitimate interest in keeping it alive.

"When the estate has no connection with other interests, what motive can a man have, who owns the equity of redemption and purchases in a subsisting mortgage, to keep this mortgage alive in his own hands, against his own estate? It could not be of any use but a mischievous one, as against subsequent purchasers or encumbrancers, and for such a purpose the merger is not to be prevented, nor the charge upheld by the aid of this court": Starr v. Ellis, 6 Johns. Ch. (N. Y.) *393. He will not even be allowed to keep it alive for the sole purpose of throwing the whole burden upon the reversioner, taking an assignment and keeping it outstanding during the continuance of his estate: Lamson v. Drake, 105 Mass. 564. So far as his estate or interest is concerned, in the absence of intervening interests or other special circumstances making such result inequitable, the lien is extinguished: Singleton v. Singleton, 60 S. C. 216, 38 S. E. 462; Miller v. Miller, 22 Misc. Rep. 582, 49 N. Y. Supp. 407.

"A court of equity will keep an encumbrance alive or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the party. The intention, however, must be innocent, and injurious to no one": Andrus v. Vreeland, 29 N. J. Eq. 394. In the case at bar, to keep the lien alive, as to the life estate of the husband, could not fail to operate injuriously to the wife, and the sole interest which the husband could have had in preserving the charge for any purpose beyond reimbursement out of the reversion for the proportion justly chargeable thereon was to enable him to borrow money upon his life estate and pledge it for payment thereof, without his wife's concurrence and in fraud of her homestead rights. An in-

tention to prevent merger for such a purpose will not be countenanced in a court of equity. Equity will look at the substance, rather than the form; [368] and, in substance, the subsequent assignment of the whole charge is the creation of a new encumbrance upon the life estate. No refinements of equity will be permitted to circumvent the express and salutary requirement that the wife must concur in the encumbrance of the homestead: Jenkins v. Simmons, 37 Kan. 496, 15 Pac. 522; Campbell v. Babcock, 27 Wis. 512; Spencer v. Fredendall, 15 Wis. *666; Barber v. Babel, 36 Cal. 11. In several of these cases the very doctrine that equity will prevent a merger, relied upon in the case at bar, was urged as a ground for enabling the husband, acting alone, to revive or reissue an encumbrance upon the homestead which he had paid.

But counsel contend that a distinction is to be made in the case at bar by reason of the fact that the husband took an assignment at the time he paid the mortgage debt. They say: "Where he takes an assignment, it does not merge in any degree, but remains as distinct as if it was in the hands of the assignor, or as it might have been in the hands of the assignee, had he no other interest in the property."

Taking an assignment is merely evidence of the intention with which the encumbrance was paid. It is not the assignment, but the intention and the interest of the party, which prevents merger. If one pays off a mortgage or other charge upon his own estate, or upon the entire estate for the protection of his individual estate or interest, he may often keep the charge alive, as to such individual estate or interest, by taking an assignment which makes his intention manifest. But if the preservation of the lien as to such estate or interest would operate fraudulently or inequitably, it will not be permitted, and the lien will be deemed extinguished, so far as it covered, and to the proportion chargeable upon, the individual estate or interest of the person paying it off, notwithstanding the assignment: Atherton v. Toney, 43 Ind. 211; Moore v. Olive, 114 Iowa, 650, 87 N. W. 720; Frey v. Vanderhoof, 15 Wis. 397. In Atherton v. Toney, 43 Ind. 211, the court said: [369] "To allow the appellee, Toney, to buy in the outstanding obligation, to secure which the mortgage was given, and use it as a setoff against a note given for the purchase money, would enable him to hold the whole interest in the land, when he purchased only the equity of redemption. It would give him the benefit of a

covenant against encumbrances when none was made. It would enable a purchaser of an equity of redemption on a credit, at a price equal to an outstanding mortgage given to secure a note of the seller, to defeat the collection of the purchase money by buying up and taking an assignment of the debt and using it as a setoff, and thus secure the property at one-half of the purchase price. That would not be for an innocent purpose."

However convenient it might sometimes be for husbands, and however much they might deem it to their interest, to be able, when once the homestead had become subject to an encumbrance, to take an assignment upon payment thereof and revive the encumbrance, as their debts or future necessities might require, without the necessity of consulting their wives, a court of equity cannot be asked to sanction such proceedings. We think, therefore, that the assignment of the mortgage to the plaintiff was ineffectual, as to the life estate of the husband, and that the mortgage is not enforceable against that estate.

A further question is raised—how far the mortgage is enforceable in this suit as against the holders of the reversion, who are infants. It is urged, on their behalf, that when their father, who was tenant for life, paid off the outstanding encumbrance, he must be held to have done so, and to have held it for the benefit of the reversioners as well as for his own benefit, and that they were entitled to an election whether to contribute the proportion justly chargeable upon the reversion before the tenant for life could make use of the encumbrance for his own purposes. It is urged also that the reversioners, being infants, have not had this election afforded them. But we think the [370] rule that a tenant for life who buys in an outstanding encumbrance is regarded as holding it for the benefit of the reversioner as well as for his own benefit means only that he will not be permitted to acquire an adverse title by or through such purchase, or otherwise cut out the reversioner's right of contribution, without affording the latter an opportunity to redeem. Where the mortgagee has the legal title and the mortgagor only an equity of redemption, a tenant for life who acquires the mortgagee's title and claims possession under it is misusing his possession. If in any other way he takes advantage of his possession and of his purchase of the outstanding encumbrance to obtain an adverse title, he is abusing the advantage which his possession gives him. In

such cases equity requires him to hold the new title for the benefit of the reversioner, and the latter may sue to establish the trust and to be permitted to redeem. The tenant for life, in the case at bar, had the right to be reimbursed out of the reversion for the proportion of the amount paid in discharging the encumbrance which was justly chargeable upon the reversion. For that purpose the mortgage, in his hands, was still a lien. He could have brought suit to enforce this lien by compelling the reversioners to redeem and subject the property to payment of the charge if they did not. This right he assigned to the plaintiff, and we think the latter may foreclose, as against the reversion, for the proportion for which it is liable.

It is urged, also, that an admission that no proceedings at law had been had for collection of the claim secured by the mortgage was not binding upon the infant defendants. But we need not examine this matter, as there must be a further hearing and additional findings, and the question is not likely to arise again.

We recommend that the decree be reversed and the cause remanded, with directions to find the proportion of the encumbrance paid off by James H. Bock which is justly chargeable upon the reversion, to enter decree of foreclosure against the defendants Royal Bock and James [371] Bock, Jr., therefor, and to dismiss the petition as to the defendants James H. Bock and Jennie Bock.

Duffie and Kirkpatrick, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause is remanded with directions to find the proportion of the encumbrance paid off by James H. Bock which is justly chargeable upon the reversion, to enter judgment of foreclosure against the defendants Royal Bock and James Bock, Jr., therefor, and to dismiss the petition as to the defendants James H. Bock and Jennie Bock.

A Life Tenant Who Pays **off claims or mortgages on the premises may be subrogated to the rights of the creditor or mortgagee: See the monographic note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 489.**

The Right of a Joint Owner of Land, **who has discharged an encumbrance thereon, to contribution from his co-owners is discussed in the monographic note to Stockwell v. Mutual Life Ins. Co., 98 Am. St. Rep. 34.**

LINTON v. HEYE.

[69 Neb. 450, 95 N. W. 1040.]

JURISDICTION—Appearance.—If a defendant intends to rely on a want of jurisdiction over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court, and if he appears for another purpose, such appearance is general, and a waiver of all defects in the original process, and an acknowledgment of the complete jurisdiction of the court in the action. (pp. 557, 558.)

JURISDICTION—Appearance.—If lack of jurisdiction does not appear on the face of the record, the defendant may plead to the jurisdiction or unite a plea to the jurisdiction with his other defenses to the action, without waiving his right to insist on the lack of jurisdiction of the court, but this rule is limited to cases where the plea goes to defeat a recovery by the plaintiff, and does not extend to cases where the plea is joined with a cross-complaint or counterclaim, necessitating a trial on the merits of the issues tendered by the pleadings. (p. 558.)

CONSTITUTIONAL LAW—Limitation of Actions.—A statute of limitations providing that one who has maintained an actual, continuous, notorious and adverse possession of real estate, claiming title to it against all persons for ten years, acquires a perfect title thereto, is not unconstitutional as operating to deprive the owner of his property without due process of law. (p. 559.)

LIMITATION OF ACTIONS—Adverse Possession—Married Women.—A statute providing that one who has maintained an actual, continuous, notorious and adverse possession of real estate claiming title to it against all persons for ten years, thereby acquires a perfect title thereto, applies as against a married woman during her coverture, whether a resident or nonresident of the state. (p. 560.)

J. O. Yeiser, for the plaintiffs in error.

J. C. Watson and J. V. Morgan, for the defendants in error.

451 ALBERT, C. This is an action to quiet the title to several tracts of land, each plaintiff asserting title to a separate tract. The title of each is traceable to separate conveyances from one Finlay, as attorney in fact for the defendants. Those of the plaintiffs who claim immediately under such conveyances had been in the open, notorious, exclusive and adverse possession of their respective tracts, claiming title under such conveyances for more than ten years before the commencement of this action; the possession of those claiming by virtue of mesne conveyances, coupled with that of their mesne grantors, was for a like period and character and under a like claim of title. The title of each, therefore, as disclosed by the petition, is based on a conveyance from the said Finlay, as attorney in fact for the defendants, and upon adverse possession. Service on the defendants was had by publication. They appeared specially and ob-

jected to the jurisdiction of the court over their persons, on the grounds that the affidavit for service by publication and the notice published in pursuance [452] thereof, were defective in certain particulars, and that such notice was not published for the period required by law. The objections were overruled, and the defendants answered.

In their answer the defendants review the objections to the jurisdiction of the court, and admit the possession of the plaintiffs and their mesne grantors to have been as alleged in the petition. Further answering the defendants allege, in substance:

1. That at the time of the said conveyances by the said Finlay, as attorney in fact, the title to the said lands was in the defendant, Phœbe R. E. E. Linton, for life, remainder over to the issue, naming them, of her marriage with her codefendant, who had no interest whatsoever in the land.

2. That the power of attorney, by virtue of which the said Finlay assumed to act in making said conveyances, was wholly void and of no effect, for the reason that it was not executed, acknowledged and stamped as required by the laws of England when it was made.

3. That adverse possession for more than ten years "does not constitute an equitable title, or afford authority or reason for a court of equity to extinguish a legal title or the title of the defendants"; that the statute of limitations of this state, as regards actions for the recovery of real estate, as construed by this court, is unconstitutional in that, as thus construed, it permits a person to be deprived of his property without due process of law. The prayer for relief is, that the plaintiffs' petition be dismissed, that the said conveyances from Finlay, as attorney in fact for the defendants, be adjudged null and void, and that all claims of the plaintiffs in and to the said lands be forever extinguished, and for such other relief as may be equitable. The defendants afterward presented what is denominated in the record as a cross-bill, asking that the issue of this marriage be brought in as parties to the suit, and that they be required to set up their interest in the lands in controversy. Leave to file a cross-bill [453] was denied by the court. The reply of the plaintiffs is a general denial. A trial to the court resulted in a finding and decree for the plaintiffs. The defendants prosecute error.

It is first urged that the court had no jurisdiction over the defendants. The general rule, settled by a long line of

authorities, is, that if a defendant intends to rely on a want of jurisdiction over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court. If he appear for another purpose, such appearance is general, and a waiver of all defects in the original process, and an acknowledgment of the complete jurisdiction of the court in the action: Bankers' Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N. W. 484; Omaha Loan etc. Co. v. Knight, 50 Neb. 342, 69 N. W. 933; Leake v. Gallogly, 34 Neb. 857, 52 N. W. 824; South Omaha Nat. Bank v. Farmers' etc. Nat. Bank, 45 Neb. 29, 63 N. W. 128; Dryfus v. Moline, Milburn & Stoddard Co., 43 Neb. 233, 61 N. W. 599; Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019. An exception to this rule is, that where the lack of jurisdiction does not appear on the face of the record, the defendant may unite a plea to the jurisdiction with his other defenses to the action, without waiving his rights to insist on the lack of jurisdiction of the court: Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019. But we think such exception must be limited to cases where the plea to the jurisdiction is joined only with such defenses as go to defeat a recovery by the plaintiff, and should not be extended to cases where, as in this case, such plea is joined with a cross-petition, or counterclaim, which necessitates a trial on the merits of the issues tendered by the petition. Such pleading, though denominated an answer, contains all the essential elements of a petition or complaint, and might be made the basis of an independent action and decree against the plaintiffs. It puts it beyond the lawful power of the court to dispose of the case, by a finding on the issues tendered by the plea to the jurisdiction, and compels an adjudication on the merits. The defendants, having thus compelled an adjudication on the merits, cannot now be heard to question the authority of the court whose jurisdiction they thus invoked.

454 Another complaint of the defendants is based on the refusal of the court to require their children to be brought in as parties to the action. We are unable to see how the ruling of the court in this behalf was prejudicial to the defendants. The relief sought by the plaintiffs was an adjudication, quieting their title as against the claims of the defendants. That there might be other parties having, or claiming to have, some interest in the premises, would not strengthen the defense nor assist the court, in the slightest degree, in a just determination of the respective rights of the

parties before it. So far as the parties not before the court are concerned, they are not affected by the decree.

A considerable portion of the defendants' brief is devoted to the question of title by adverse possession. The facts upon which the plaintiffs base their claim to title by adverse possession are not denied, but the defendants strongly insist that while our statute of limitations, in respect to actions for the recovery of real estate, operates to extinguish the remedy, it does not extinguish the right. The learned counsel for the defendants does not overlook the decisions of this court to the effect that one who has maintained an actual, continued, notorious and adverse possession of real estate, claiming title to the same against all persons for ten years or more, acquires a perfect title thereto: See Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494, and cases there cited. But it is contended that the statute, as thus construed, operates to deprive the owner of his property without due process of law, and is therefore unconstitutional. We think it too late in the day to go into that question. It is the policy of the law that the dominion of things should not long remain uncertain, so as to disturb the peace of society by giving rise to numerous controversies and perpetual litigation. Hence, statutes of limitations exist in every state in the Union. In speaking of such statutes, Miller, J., in Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209, 29 L. ed. 483, said: "The weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open [455] possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him": Citing Leffingwell v. Warren, 2 Black (U. S.), 599, 17 L. ed. 261; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. Rep. 399, 28 L. ed. 962; Croxall v. Shererd, 5 Wall. (U. S.) 268,

18 L. ed. 572. This court is fully committed to that doctrine: Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494.

But the defendants contend that the statute of limitations does not apply to the wife in this case, because, by section 17 of the code, the statute of limitations does not operate against married women during coverture, and that the amendment thereof, by implication, by the provisions of chapter 53 of the Compiled Statutes (Annotated Statutes, 5317), relative to married women, applies only to married women in this state, and that as Mrs. Linton is a nonresident, the statute does not run against her.

In Murphy v. Evans Steam Laundry Co., 52 Neb. 593, 72 N. W. 960, this court held, since the enactment of the provisions of chapter 53, the statute of limitations runs against married women during coverture, notwithstanding the provisions of section 17. There is nothing in chapter 53 to indicate that it was intended to limit it, so far as it operates to enable a married woman to maintain an action in her own name, to residents in this state. The provision is general that a married woman may, while married, sue and be sued, in the same manner as if she were unmarried. Consequently, [456] the rule announced in Murphy v. Evans Steam Laundry Co., 52 Neb. 593, 72 N. W. 960, applies not only to women who reside in this state, but also to nonresidents, and to the wife, defendant in this case. Besides, having joined with her husband in the motion for a new trial, and in the petition in error, under the repeated rulings of this court, no defense not available to her codefendant, as well as herself, is available to her.

Considerable space is given to a discussion of the question of the validity of the power of attorney, under which Finlay executed the conveyances hereinbefore mentioned. It is not claimed that they were not given by the defendants, but merely that they were invalid under the laws of England where made. In view of the sufficiency of the plaintiffs' title by adverse possession, we do not deem it necessary to go into that question. If we are correct in our construction of the law, the title of the plaintiffs by adverse possession stands admitted, and is perfect, so that it would be useless to go into the other questions raised by the defendants.

It is recommended that the decree of the district court be affirmed.

Barnes and Glanville, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree of the district court is affirmed.

The Principal Case was carried to the supreme court of the United States and there affirmed April 11, 1904, and is reported as Linton v. Heye, 194 U. S. 628. The opinion of the court as there reported is: "Judgment affirmed with costs on the authority of Campbell v. Holt, 115 U. S. 620; Richardson v. Louisville etc. R. R. Co., 169 U. S. 128; Giles v. Little, 134 U. S. 645. See Lantry v. Wolff, 49 Neb. 374; Murphy v. Evans Steam Laundry Co., 52 Neb. 593; Linton v. Heye, 69 Neb. 450, 95 N. W. 1040."

A Party Who Makes a General Appearance usually cannot thereafter question the jurisdiction of the court over him; if he contends that no jurisdiction over him has been acquired, his remedy is by special appearance and objection to the jurisdiction: Baker v. Union etc. Bank, 63 Neb. 801, 93 Am. St. Rep. 484. A party who appears generally by demurrer is estopped subsequently to question want of service of process upon him: Willman v. Friedman, 4 Idaho, 209, 95 Am. St. Rep. 59. And an agreement for a continuance may amount to a general appearance: Baisley v. Baisley, 113 Mo. 544, 35 Am. St. Rep. 727; Honeycutt v. Nyquist, 12 Wyo. 183, 109 Am. St. Rep. 975.

LEMMERT v. GUTHRIE BROTHERS.

[69 Neb. 499, 95 N. W. 1046.]

GUARANTY—Notice of Default.—If a note is given with guaranty and the makers are solvent at the time of the maturity of the note, but insolvent at the time of notice to the guarantor, he being entitled to notice, he is damaged in the amount due upon the note by reason of the failure to give him notice of the default of the maker. (p. 564.)

GUARANTY—Notice of Default—Damage to Guarantor.—The failure of the holder of a negotiable note to notify the guarantor of the default of the maker within a reasonable time after default does not absolutely discharge the guarantor, but only to the extent that he is damaged by the delay. (p. 565.)

GUARANTY—Failure to Give Notice of Default.—If, at the time that the makers of a note are solvent, guarantors sign the following guaranty upon the back of the note, "For value received, we hereby guarantee payment of the within note and waive demand and protest on the same when due," and the note is not paid at maturity when the makers are solvent, nor demand made upon the guarantors until long after, and when the makers are insolvent, the guarantors, by their indorsement, do not waive notice of the nonpayment of the note at maturity, and from want of such notice are discharged from liability. (pp. 568, 569.)

GUARANTY is a Contract Separate and apart from the note itself, and the guarantor and maker of the note cannot be joined in one action, while the maker and indorser may. (p. 569.)

Cole & Brown and G. W. Seevers, for the plaintiff in error.

T. H. Stubbs and W. F. Buck, for the defendants in error.

[500] KIRKPATRICK, C. This is an action brought in the district court for Nuckolls county by plaintiff in error against Guthrie Brothers, a partnership, and Robert Guthrie and David Guthrie, the members of such partnership, upon the guaranty of a promissory note. The undisputed testimony shows that in the spring of 1893 A. J. Briggs, George F. Cotton and J. G. Meek were engaged in the brick business, and purchased from the Frey-Sheckler Company, an Ohio corporation, some brick-making machinery, for something more than six thousand dollars, and in payment therefor they executed to the Frey-Sheckler Company various promissory notes for one thousand and seventy-four dollars and ninety cents each, coming due at different dates. It is further disclosed that the above-named parties, before delivering the notes, procured defendants in error to guarantee their payment. All of those notes were paid except the one maturing last, which the Frey-Sheckler Company disposed of to plaintiff in error, W. C. Lemmert, the president of the corporation, but who seems to have paid full value for the note. Shortly before the maturity thereof the makers, Briggs and others, desiring an extension, wrote to Frey-Sheckler Company, requesting such extension; the company informing them that they had sold the note to plaintiff in error, but would take the matter of extension up with him, and an extension was accordingly subsequently arranged for; plaintiff in error stipulating that he would grant the extension if Briggs and others would sign the note, individually, as makers, and procure the same guaranty on the note that appeared upon the old one. Accordingly, the note in suit, dated June 1, 1894, payable in sixty days, was signed by Briggs, Cotton and Meek, naming Frey-Sheckler Company as payee. Before sending the note to the company the makers took it to defendants in error and requested them to guarantee the note. It is disclosed that the guarantors had no knowledge that the note had been transferred by the Frey-Sheckler Company to plaintiff in error. When the machinery [501] was purchased in the first instance, the company took a contract, by the terms of which the title to the property was to remain in them until the full payment of the purchase price. This was understood by defendants in error. They signed their firm name upon the renewal note under a guaranty in the words following:

"For value received, we hereby guarantee payment of the within note, and waive demand and notice of protest on same, when due.

"GUTHRIE BROTHERS."

The undisputed evidence discloses that, at the time of the execution and delivery of the note, the makers were engaged in the brick manufacturing business; were the owners of a valuable plant; and were also engaged in the banking business; and all of them were solvent. No notice was given to the guarantors of the dishonor of the note until about eighteen months after its maturity, and, at that time, the undisputed evidence discloses that the makers were, each, wholly insolvent. In the meantime they had disposed of all of the machinery purchased of the Frey-Sheckler Company to parties having no notice of the lien of that company thereon, the company having failed to place of record its contract reserving title in itself.

The petition filed in the case sets out a copy of the note, together with a copy of the guaranty, and charges defendants in error as guarantors and indorsers. To this petition defendants in error interposed an answer, setting up four distinct defenses as follows: 1. A denial of any consideration for the note and for the guaranty; a denial that plaintiff in error ever purchased the note for the payee therein named, or that plaintiff in error ever paid any consideration for the note; 2. Laches, in not giving defendants in error notice of the nonpayment of the note; and consequent damages, which released them from liability on their guaranty; 3. The wasting and disposing of security, which released defendants of all liability on the note; 4. A diversion of the guaranty, which absolutely released defendants as guarantors.

502 There seems to have been practically no dispute in the evidence introduced at the trial, and at the close of the evidence the trial court, at the request of defendants in error, instructed the jury to find a verdict for them. From a judgment rendered on such verdict, and from the ruling denying the motion for a new trial, plaintiff in error brings the cause to this court upon error.

If any one of the defenses pleaded is conclusively established by the evidence, and is in fact a complete defense, the peremptory direction was justified, and the judgment must be affirmed. In our view of the case it will only be necessary to consider the second defense pleaded. Inasmuch as the evi-

dence clearly establishes the solvency of the makers at the maturity of the note, and their insolvency at the time of notice to the guarantors, if the guarantors were entitled to notice, they were damaged in the amount due upon the note, by reason of the failure to give notice. Some diversity in the decisions is found to exist upon the question whether, under an instrument like that in this case, the person signing is entitled to notice of the default of the maker. From an extended examination of the cases, we are led to the conclusion that the diversity arises because of a failure to recognize the distinction between the liability of a guarantor and that of an indorser. This distinction is stated in apt language in 2 Daniel on Negotiable Instruments, fifth edition, section 1754: "The liability of a guarantor also differs materially from, and is more onerous than, that of an indorser. The indorser contracts to be liable only upon condition of due presentation of the bill or note on the exact day of maturity, and due notice to him of its dishonor. And he is absolutely discharged by failure in either particular, although he may suffer no actual damage whatever. The guarantor's contract is more rigid, and he is bound to pay the amount upon a presentment made, and notice given to him of dishonor, within a reasonable time; and in the event of a failure to make presentment and give notice [503] within such reasonable time, he is not absolutely discharged from all liability, but only to the extent that he may have sustained loss or injury by the delay."

That a guarantor is entitled to such notice, and that a failure to give it within a reasonable time releases him from liability to the extent that he may be damaged, seems to be sustained by the better text-writers and by a very great weight of authority: 2 Parsons on Notes and Bills, 2d ed., pp. 137-139; Tiedeman on Commercial Paper, sec. 421; Second Nat. Bank of Oxford v. Gaylord, 34 Iowa, 246; 1 Brandt on Suretyship and Guaranty, 2d ed., sec. 197; Oxford Bank v. Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334; Wildes v. Savage, 1 Story (U. S. C. C.), 22.

This court, at a very early date, in Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995, speaking by a late judge, said: "When a guarantor is not notified of a default of his principal within a reasonable time, he is released from liability to the extent that he may be damaged by the omission. And if it appear that the principal was solvent at the maturity

of the obligation, but became insolvent before the demand of payment was made or notice given, except under special and peculiar circumstances, damages will be presumed."

The case cited was, where Herman Diers was acting as the agent of the wagon company in the sale of its wagons. He sold a wagon to certain persons and took their note in payment; but before delivering the note to the wagon company he indorsed his name in blank on the back thereof. It was disclosed in that case that by the terms of his contract with the company he agreed to guarantee notes taken, and for that reason this court seems to have determined his liability as one of guaranty. This determination of the rights and liabilities of a guarantor seems never to have been overruled in this state. It seems based upon sound reason and supported by authority, and we are not inclined, at this time, to announce a different rule.

It is contended by plaintiff in error that this court in 504 Huff v. Slife, 25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289, has adopted a rule exactly contrary to that announced in the Newton Wagon Company case (10 Neb. 284, 4 N. W. 995). In the Huff case (25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289), Zenus Farier executed a note to one I. L. Huff, as payee. Huff, desiring to sell the note, wrote on the back thereof, and signed, the following guaranty:

"I guarantee the payment of the within note.

"I. L. HUFF."

It is thus disclosed that Huff, being payee of the note, and transferring it as he did, became not only an indorser, but a guarantor of the note as well. As indorser, he was absolutely bound to pay the note, if at maturity the note was protested for nonpayment, and he was duly notified. The holder need not have sued the maker, or might have joined Huff as indorser. In either case there could be no question of Huff's liability. By adding to his indorsement the words, "I guarantee the payment of the within note," he also made himself a guarantor, and this waived his right to notice of protest and nonpayment. As indorser, he was made liable by the terms of his contract, but protest and notice thereof would have been required to fix his liability. But as guarantor, he waived this right, so that, beyond question, he was absolutely liable, and his liability in no way depended upon proper steps being taken to collect from the maker of the note. As stated in 2 Daniel on Negotiable Instruments, fifth

edition, section 1754: "The same person may be guarantor and also indorser of a note; and in such case, while failure to give him due notice of demand and nonpayment will discharge him as indorser, he will still be bound as guarantor."

Huff v. Slife, 25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289, seems to rest for authority upon Bloom v. Warder, 13 Neb. 476, 14 N. W. 395, and Hungerford v. O'Brien, 37 Minn. 306, 34 N. W. 161. In the Bloom case (13 Neb. 476, 14 N. W. 395), the guaranty was as follows: "For value received, we guarantee the payment of the within note, and hereby waive protest, demand, and notice of nonpayment."

505 It will thus be seen that the guarantor had waived the very defense upon which defendants in error were allowed to recover in this case. The guarantor in the last case cited, having expressly waived notice of nonpayment, of course, could not be heard to insist upon want of notice. It follows, therefore, that Bloom v. Warder, 13 Neb. 476, 14 N. W. 395, is not an authority in the case at bar, is not in conflict with the conclusion we have reached, nor is it an authority in support of Huff v. Slife, 25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289, because the questions involved are distinctly different. In the Hungerford case (37 Minn. 306, 34 N. W. 161), also cited in Huff v. Slife, the payee signed a guaranty, as follows: "For value, I hereby guarantee the payment of the within note to Cassie Hungerford or bearer."

It thus appears that he was an indorser, as well as a guarantor, and his liability being fixed by the double character of his contract, it was absolute. The case, accordingly, does not furnish an authority contrary to the rule announced herein.

It is also contended that Gibson v. Parlin & Orindorff, 13 Neb. 292, 13 N. W. 402, supports a different rule. There, the payee indorsed the note, waiving demand upon the maker, protest and notice of nonpayment, and it was held that a right of action accrued against him as soon as the note became due. As we have seen, the rule, in this case, has no application to the case at bar, where it is sought to charge a party as guarantor only upon the note.

Flentham v. Stewart, 45 Neb. 640, 13 N. W. 924, is cited, as announcing a view contrary to Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995. The Flentham case (45 Neb. 640, 63 N. W. 924) arose in the following manner: Dawes & Foss, a copartnership, doing business at Crete, Nebraska, were engaged in the farm mortgage business, and made a loan to one

Stewart. It seems they were paid a commission for negotiating this loan by appellant Flentham, and in addition took a second mortgage for a commission due them upon the same land. Default having been made upon the mortgage, appellant began foreclosure, making Dawes, Foss and Charles C. White, who in the mean time had been appointed receiver for the copartnership, [506] defendants. A decree was entered upon the first and second mortgage, an order of sale issued, and the property sold for satisfaction of the decree; and there remaining a deficiency due upon the first mortgage, appellant Flentham filed a motion for a deficiency judgment against Dawes, Foss and the receiver, upon the ground that Dawes and Foss had guaranteed the payment of the note and coupons. Objection seems to have been interposed to this by Dawes, Foss and the receiver, and the motion was by the trial court denied. Appellant Flentham brought the cause to this court upon appeal. Two principal questions seem to have been litigated in this court; the contention by Dawes and Foss that, inasmuch as a receiver had been appointed for the copartnership, a suit could not be maintained against them or the receiver without permission of the court, with reference to which it was held that the objection was waived by taking a decree upon the second mortgage; the further contention that no notice had been given to Dawes and Foss of the application for a deficiency judgment, as to which it was held that due notice was given, and that they had appeared and asked time to answer; a further contention seems to have been made, namely, that no guaranty had been made of the note and coupons, as to which defense this court said: "This contention is wholly without merit. The guaranty made by Dawes and Foss, of the payment of the mortgage debt, was in writing, and became and was a joint and several obligation of the members composing the copartnership."

While the form of the guaranty is not disclosed in the opinion, it is disclosed by an examination of the record that it differed from the one in the case at bar, in that the guarantors waived "notice," but it is readily apparent that no defense was tendered that Dawes and Foss had been in any way damaged by want of notice, and, in fact, it was disclosed in the entire record that they had notice all the way through, and appeared in the foreclosure proceedings, taking a decree upon their second mortgage. [507] The case seems not in point, and not an authority in conflict with Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995.

Again, it is contended that a recent case, McKibbin v. Ripley, 1 Neb. (Unof.) 648, is contrary to the doctrine announced in the Newton Wagon Company case (10 Neb. 284, 4 N. W. 995). From an examination of the record, in the case cited, it is disclosed that the guaranty in controversy was in the language following: "For value received, we guarantee the payment of the within note at maturity, and waive protest and notice of nonpayment."

It will thus be seen that in the case just cited the guarantor waived notice of nonpayment, which defendants in error herein did not, and it follows that the case does not conflict with the Newton Wagon Company case (10 Neb. 284, 4 N. W. 995), or with the view announced herein. The cases cited by plaintiff in error from other states we do not find sufficiently in point to demand consideration.

It must be kept in mind that defendants in error are not indorsers of the note sued upon. They were strangers to the original contract. As guarantors, they had a right to fix the terms of their contract. Whether, in the absence of evidence to the contrary, had they simply signed their names on the back of the note in blank before its delivery, they would have been held as accommodation indorsers, guarantors or sureties, is not involved in this case, and need not be decided. As makers of an independent contract, they had a right to limit their liability to that of guarantors. This court has many times held the indorser on a note liable who had, in addition to his liability as such, made himself liable as a guarantor, but it has been said that he was simply an indorser with an enlarged liability: Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; Helmer v. Commercial Bank, 28 Neb. 474, 44 N. W. 482; Weitz v. Wolfe, 28 Neb. 500, 44 N. W. 485.

The soundness of the rule in Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995, has been recognized in Liniger & Metcalf Co. v. Wheat, 49 Neb. 567, 68 N. W. 541, where it is said: [508] "The neglect to notify the guarantor of the default of his principal does not operate to discharge the guarantor, unless such neglect is, on its face, unreasonable in view of all the circumstances of the case." And in Pollard v. Huff, 44 Neb. 892, 63 N. W. 58, the rule is affirmed.

It is finally contended that, by the use of the words in this guaranty, "waive demand and notice of protest on same, when due," defendants in error waived all notice of nonpay-

ment by the makers. We are unable to see merit in this contention. The guaranty seems to have been placed on the back of the note with a stamp, and under it the name of "Guthrie Bros." was written. It is very apparent from the language used that the words, "waive demand and notice of protest on same, when due," have no application, and are not intended to waive the notice of nonpayment, to which a guarantor is clearly entitled. The language used would be proper to fix the liability of an indorser, and is only a waiver of the protest, and notice of protest of the law-merchant, necessary to charge an indorser as such.

Again, it is contended that the following language on the face of the note, "the drawers and indorsers severally waive presentment for payment, protest and notice of protest, and nonpayment of this note," is a sufficient waiver. As we have seen, defendants in error are neither drawers nor indorsers. The settled rule is that the contract of guaranty is a contract separate and apart from the note itself. This court has said that a guarantor and maker of a note cannot be joined in one action, while a maker and indorser can be joined, thus clearly recognizing the distinctive character of the two contracts.

In the case at bar, the undisputed evidence shows that for six months after the maturity of the note the makers were solvent, and that during the succeeding twelve months, before their failure to pay was brought to the attention of the guarantors, they had become wholly insolvent. It is further disclosed by the record that this failure to give notice seems to have been occasioned by plaintiff [509] in error having mislaid the note in his deposit vault, so that it was not found until about the time the notice was given and suit brought. For this delay defendants in error were not responsible, and should not be prejudiced thereby. From what has been said, it clearly appears that defendants in error were damaged by failure to give the notice, to the full amount of the note. It follows that the judgment of the trial court, upon the verdict directed in their favor, was right, and it is therefore recommended that the same be affirmed.

Hastings, C., concurs.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Right of the Guarantor of a note to notice of the default of the maker is discussed in the monographic note to Pearsell Mfg. Co. v. Jeffreys, 105 Am. St. Rep. 516-519, where the principal case is cited. In the recent case of Rouse v. Wooten, 140 N. C. 557, post, p. 875, it is held that a surety on a note is not entitled to notice of dishonor.

TREPHAGEN v. CITY OF SOUTH OMAHA.

[69 Neb. 577, 96 N. W. 248.]

MUNICIPAL CORPORATIONS—Enforcement of Special Tax —Presumptions.—The burden is on a city seeking to enforce a special tax to show that all the proceedings made essential by the statute, leading up to the special assessment, have been strictly followed. There is no presumption coming to the aid of the city which seeks to enforce the lien of a special tax. (p. 573.)

CORPORATIONS—Power of General Manager.—The authority of a general manager of a corporation, organized for the care and sale of livestock to a certain market, to conduct its ordinary business, is not broad enough to empower him to sign a petition for paving a city street, and thus bind the real estate of the corporation, abutting thereon, with the cost of such improvement. (p. 574.)

CORPORATIONS—Street Assessments.—The act of signing the name of a corporation to a petition for opening a highway over its real property, or the paving of a street abutting thereon, whereby a special tax will be assessed and become a charge against the property of the corporation, is one which falls within the managing powers of the board of directors, who are the managing agents of the corporation. The general manager of the corporation has no such power unless it is especially delegated to him. (p. 575.)

MUNICIPAL CORPORATIONS—Power to Levy Assessments. Without legislative enactment, no city, or other municipal corporation, has any right to levy a tax or assessment upon the property of its citizens. (pp. 576, 577.)

MUNICIPAL CORPORATIONS—Garbage Tax.—Without legislative authority, a city has no power to assess and levy a special garbage tax and make it a specific charge upon the real property of a citizen. (p. 577.)

A. H. Murdock, for the appellant.

H. W. Pennock, for the appellee.

577 BARNES, C. Georgia A. Trephagen, H. L. Wilton, Mike Higgins and Kornelia Adamowicz, appellees, commenced this action in 578 the district court for Douglas county to restrain the treasurer of the city of South Omaha from collecting certain special taxes or assessments levied against and upon certain lots belonging to them, situated in said city; to cancel the said special taxes and remove the cloud created

by the assessment and levy thereof on their title to said lots. The petition alleged, in substance:

That the city had pretended to assess certain special taxes against their specific property for paving, curbing and guttering that part of "L" street from the west end of the viaduct to the west line of Thirty-third street, situated in paving district No. 6 of said city; that prior to the attempted passage and approval of the ordinance ordering said paving there had never been filed with the clerk of said city, or presented to the city council, a petition signed by the property owners representing a majority of the front feet or area within the limits of said paving district, as defined in said ordinance; that a paper called a petition was filed with the said clerk requesting that the street be paved with Colorado sandstone on six inches of sand; that the said paper was not a petition, but was a mere selection of materials, and was not signed by the owners of a majority of either the front feet or area of the real estate within said district; that there appears upon said paper the names of Joseph Schlitz Brewing Company, Ed. Ainscow and R. D. Mattice, but neither of said parties owned any real estate within said district at the date thereof, nor at the time defendant passed the ordinance ordering the said street to be paved; that there also appears upon said paper the name of the Union Stock Yards Company, by W. N. Babcock, G. M.; and it was alleged in the petition that said Babcock had no authority to sign the name of the Union Stock Yards Company, and the same was placed upon said paper without the authority of the said corporation, and should not be considered as a lawful signature; that no other paper purporting to be signed by property owners in said district was ever filed with the clerk or with the city council in connection with the paving [579] or curbing of said street, and no other proceedings were had than those mentioned in the petition, in connection with the paving of said street, and the assessment of the cost thereof on the adjacent and abutting property; that the city council failed to sit as a board of equalization, and failed to assess benefits to the property of the plaintiffs, and failed to make any finding of any character respecting said assessment, and failed to give notice of said proposed equalization by publication for six days prior to said seventh day of January, 1892, in any daily paper of said city; that by the terms of a certain special ordinance (No. 32) large amounts of special

taxes were levied upon the real estate of the appellees to pay the costs of said paving and curbing, and the said ordinance was duly certified by the city clerk to the city treasurer, and was by him entered upon the tax lists, and became and is an apparent charge and lien upon the plaintiffs' real estate, but the said assessments were null and void for the reasons above set forth.

For their second cause of action, appellees alleged: That the city attempted to pass a special ordinance, numbered 134, by the terms of which lot 7, block 357, was charged and assessed with the sum of thirty-five dollars and fifty-three cents for the cost of the construction of an alleged sidewalk in front of said property; that, prior to the passage of said ordinance, no notice had been given to the owners of said property, and no notice had been published of said proposed assessment; that the owners had never been required to construct the sidewalk or notified that a sidewalk had been ordered, and had never been given any opportunity to construct the same, and that all of the proceedings of said city council with reference thereto were null and void.

For their third cause of action the appellees alleged: That the city attempted to pass, and, thereafter, there was approved by the mayor of said city, a special ordinance (No. 87) by the terms of which lot 7, block 357, was charged and assessed with the sum of nineteen dollars and sixty-four cents, as an alleged garbage assessment, for removing garbage from said property; [580] that said property was not subject to an assessment for removing garbage; that there was and is no authority of law for assessing specific real estate in said city for the removal of garbage, and all of the acts of the city council in attempting to levy and in levying an assessment therefor were and are null and void. The petition concluded with a suitable prayer for relief.

The appellant, by its answer, denied each and every allegation contained in the petition, except those expressly admitted; set up a plea of the statute of limitations; and, for a third defense, contained matters supposed to create an equitable estoppel. The reply was a general denial. The cause was duly tried, and the court found generally in favor of the appellees and rendered a decree canceling the alleged special taxes, restraining the collection thereof and removing the apparent cloud from the title to the lots described in the petition. From this decree the city appealed,

and now contends that the court erred in its findings and judgment as to each of the several causes of action set forth in the petition, and that the evidence is not sufficient to sustain the decree.

The rule is, that in order to confer jurisdiction upon a city council to order paving and curbing, and authorize the assessment of the cost thereof against the abutting real estate, a petition therefor must be presented, signed by the owners of a majority of the feet frontage upon the street to be thus improved; and this rule is so well settled in this state that it is unnecessary to cite authorities in support of it. In fact, the appellant concedes this to be the rule. It may be further said that the burden is on the city seeking to enforce such a tax to show that all the proceedings made essential by the statute—which is the city charter—leading up to the special assessment, have been strictly followed; that there is no presumption coming to the aid of the city which seeks to enforce the lien of a special tax: Merrill v. Shields, 57 Neb. 78, 77 N. W. 368; Smith v. City of Omaha, 49 Neb. 883, 69 N. W. 402.

It is a recognized rule of construction, especially applicable [581] to actions of this character, that those things which the law regards as the substance of the proceedings cannot be treated by the courts as immaterial; that the record must show, affirmatively, a compliance with all the conditions essential to a valid exercise of the taxing power, and that their omission will not be supplied by presumption. It therefore devolved upon the appellant in this case to show that the special taxes complained of were legally levied.

It was stipulated by the parties on the trial in the court below that the property owned by the Union Stock Yards Company constituted a majority of the feet frontage abutting on the street paved; consequently the validity of the petition turns upon the purported signature of that corporation thereto. Evidence was introduced by the appellant which showed that the Union Stock Yards Company was a corporation organized for the purpose of conducting a general stock yards business; that the business of said corporation was the yarding, feeding and taking care of cattle, hogs, sheep and horses that were consigned for sale to the South Omaha market. It was further made to appear that W. N. Babcock, who signed the name of the company to the paper or petition in question, was at that time its general manager. The appellant, recognizing the fact that it devolved upon it

to prove that Babcock had authority to sign the petition, introduced in evidence certain parts of the articles of incorporation under which the Union Stock Yards Company was organized, which we quote as follows: "The affairs of this corporation shall be conducted by a board of directors of seven members, each of whom shall hold office for one year, and until his successor is elected and takes his seat at the board; they shall elect a president, vice-president, secretary and treasurer; they shall also appoint such superintendents, managers and agents as from time to time shall be deemed necessary for the transaction of the business of this corporation. The board of directors, at their regular meeting after each annual 582 election, shall elect by ballot a president, vice-president, and may also elect a secretary and treasurer, and may continue the then incumbent in office by resolution. The board of directors shall have the whole charge and management of the property and effects of the company, and they may delegate the power to the executive committee to do any and all acts which the board is authorized to do, except such acts as by law, or by these by-laws, must be done by the board itself. The board shall have the power, in the absence of the president and vice-president, to appoint a chairman pro tempore, and, during the prolonged absence of the president or other officers, to appoint substitutes pro tempore. The board of directors shall prescribe the duties and powers of the secretary and treasurer, and all subordinate officers and agents, and shall make all needful rules and regulations not inconsistent with the articles of incorporation, for the transfer of stock of the company, the issuing of certificates of stock, keeping the records and accounts of the company, the management and disposition in particular of the stock, property, estate and effects of the company, and shall have power to delegate authority to do and perform specific acts not inconsistent with the articles of incorporation to special committees to be appointed by the board or presiding officer, at the option of the board."

It cannot be said that these provisions authorized Babcock, as general manager of the corporation, to sign the paper or petition in question. No evidence was introduced to show, or which tended to show, that the board of directors had ever authorized him to do so. We cannot presume that Babcock had power to sign the petition and thereby bind the corporation. It is true that a corporation can act only by its

agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary or general manager, is legally done and is binding upon the corporation, yet no such presumption prevails, when the act done by such officers does not fall within the scope of the powers conferred [583] upon and usually exercised by them as part of the ordinary business of the corporation. The act of signing the name of a corporation to a petition for the opening of a highway over its real property, or the paving of a street abutting thereon, whereby a special tax will be assessed and become a charge against the property of the corporation, is one which falls within the managing powers of the board of directors, who are by law and by the articles of incorporation in this case made the managing agents of the corporation; and authority to perform such an act must come from them. The appellant having failed to introduce any evidence tending to show that Babcock was authorized to sign the paper in question, by the board of directors of the Stock Yards Company, it follows that the petition or paper was void, and conferred no authority upon the city council to pave the street and assess the cost thereof against the abutting real estate: Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734; Orr v. City of Omaha, 2 Neb. (Unof.) 771; Mulligan v. Smith, 59 Cal. 206.

On the question of the equalization of the assessment for paving and curbing, it appears from the records of the city council, which are in evidence, that Friday, January 7, 1892, was the time fixed for that purpose; no meeting was held on that day, but it appears that at a meeting held on January 11th, following, it was moved that the council sit as a board of equalization, on January 22 and 23, 1892, and the motion was carried. It further appears that, at the meeting of January 22d, a recess was immediately taken until January 23d, at 4 o'clock P. M., and the city clerk was instructed to receive all complaints in writing; that on the 23d the meeting was called to order and, on a motion made by one of the councilmen, an adjournment was taken to January 25, 1892; that the adjourned meeting, so far as the record shows, was never held, and therefore the court was right in its finding that no equalization of this paving assessment had ever been made, and that the city council never held a proper meeting for that purpose.

We therefore conclude that the finding and judgment of [584] the trial court as to the paving, curbing and guttering tax must be affirmed.

As to the sidewalk assessment, it appears that no legal notice of the meeting of the board of equalization to make such assessment was ever given or published. The affidavit made by the publisher of the "Daily Tribune," the newspaper in which publication was attempted, showed that the notice of the proposed meeting for that purpose was published from October 13 to October 19, 1898; and it appears that no other notice was ever published or given to the appellees. The statute in force at that time relating to the construction of wooden sidewalks, required that the assessment to pay the cost thereof, should be made by the city council, at any meeting, by a resolution, fixing the cost of the construction or repairs of such work along the lots adjacent thereto as a special assessment thereon, and the amount charged against the same which, with the vote thereon by yeas and nays, was required to be spread at large upon the minutes; it was provided that notice of the time of holding such meeting and the purpose for which it was to be held, should be published in some newspaper published and of general circulation in the city, at least ten days before holding the same; or, in lieu thereof, personal service might have been made on the persons owning or occupying the property to be assessed. The appellant failed to show that personal service was ever made on the appellees, and it appearing that the notice in question was published only six days instead of ten, it follows that there was no such substantial compliance with the statute as would authorize the city to levy the special tax, for the construction of the sidewalk, complained of, and make it a specific charge on the abutting real estate.

It further appears that by special ordinance No. 87, the appellant levied a special tax amounting to eleven dollars and ten cents on lot 7, block 357, South Omaha, for the purpose of paying for the cost of removing garbage therefrom. The petition charges that there was no authority of law for this special [585] assessment. The trial court found for the plaintiffs, and declared this tax void. We have been unable to find any statute under which the city of South Omaha, at that time, might have levied such an assessment. It is one of the elementary principles of taxation that the power to tax lies exclusively in the legislature. Without a special

legislative enactment, no city or other municipal subdivision has any right to levy a tax or assessment upon the property of its citizens: Cooley on Taxation, 2d ed., 62, 142.

The statute not having conferred authority on the city, authorizing it to assess and levy a special garbage tax, and make it a specific charge on the lot in question, we conclude that such tax was void. The foregoing questions being the only ones argued by counsel for the appellant in his brief, no others will be considered. A careful review of the record convinces us that the findings and judgment of the trial court are amply sustained by the evidence, and accord with well-established principles of law. We therefore recommend that the judgment appealed from be affirmed.

Albert and Glanville, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

The President of a Corporation, by virtue of his office merely, has very little authority to act for the corporation. His powers depend upon the nature of the corporate business and the authority given him by the board of directors: National State Bank v. Vigo County Nat. Bank, 141 Ind. 352, 50 Am. St. Rep. 330. He does not, by virtue of his office, possess authority to bind the company by contract: St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 964.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN v. BARTES.

[69 Neb. 631, 98 N. W. 715.]

EVIDENCE of Age of Person.—The wife of a deceased husband with whom she had lived for twenty years, and to whom she had talked regarding his birthdays at different times, and who has a general acquaintance with the family history and traditions concerning his birth, age, and pedigree, is competent to testify to his age. (pp. 579, 580.)

EVIDENCE of Age of Person—Presumption.—A wife who has lived for twenty years with her husband is presumed to know his age and to be qualified to testify thereto. (p. 580.)

EVIDENCE of Age of Person.—The date of a person's birth may be testified to by members of his family, although they may know of the fact only by hearsay founded on family tradition. (p. 581.)

EVIDENCE of Age of Person—Qualifications of Witness.—The fact that the first knowledge obtained by a wife as to her husband's age is derived from an incompetent source, goes only to her

credibility, and does not disqualify her from testifying to his age where, by reason of her membership in his family, her knowledge of his age is gained from other valid sources. (p. 581.)

NEW TRIAL—Newly Discovered Evidence.—Before a new trial can be granted on the ground of newly discovered evidence, it must appear that due diligence was exercised to procure such evidence upon the original trial, and that it was through no fault or neglect of the party making the application that such evidence was not then produced. (p. 583.)

W. P. Hall and M. Gering, for the plaintiff in error.

F. Dolezal, for the defendant in error.

637 HOLCOMB, C. J. This cause is submitted on rehearing. The consideration given the case and the recommendations contained in the former opinion resulted in a reversal of the judgment of the trial court on the ground of error in not withdrawing from the jury certain evidence given by the wife of the deceased with reference to his age at the time of the execution of the contract on which is based plaintiff's right of action. The plaintiff instituted an action to recover on a policy of insurance or benefit certificate issued by the plaintiff in error, a fraternal beneficiary association, to her deceased husband, who, during his lifetime, had become a member of one of its local lodges. As a defense the association pleaded that the deceased, at the time of the issuance of the beneficiary certificate and in making application therefor, had misrepresented his age, and that he was, at the time of his admission as a member of the local lodge and the issuance of the certificate, beyond 638 the age provided for by the laws of the organization and the statutes of the state, to wit, more than forty-five years of age. This was denied by the beneficiary, the plaintiff in this action, and the wife of the deceased. On this issue of fact hinged most of the evidence submitted in the case. The wife, as a witness in her own behalf, testified as to her husband's age at the time of their marriage, and the date of their marriage, thus necessitating only a mathematical calculation to determine his age when he applied for membership in the local lodge.

The plaintiff was of Bohemian nationality and required the assistance of an interpreter in giving her testimony. On cross-examination it was developed, as is set forth in detail in the former opinion, that her first knowledge as to the age of her husband was gained by the public announcement of the parish priest in her native country of

the marriage banns, a short time prior to its celebration, which was according to a custom there obtaining. After drawing from the witness the information that this was the first and only means by which she knew her husband's age at the time of their marriage, the witness was further asked on cross-examination if she had ever talked with her husband about his age, and answered in the negative. She was then asked: "And any information about your husband's age was gained by the announcement made by the priest at the time the banns of marriage were announced?" She answered: "Yes, sir; that is it." Because of the source of the witness' knowledge of her husband's age as thus elicited on cross-examination, a motion was made to strike out all her direct testimony relating to his age; and the refusal of the court to strike out such testimony, it was thought and so held in the former opinion, constituted prejudicial error for which the judgment of the trial court should be reversed.

It is not altogether clear that the witness is disqualified from testifying relative to the age of her deceased husband, conceding the correctness of the premises of counsel for defendant, as to the announcement of the parish priest of
639 the marriage banns being the exclusive source of the witness' knowledge regarding the fact testified to.

The announcement was in its nature a public or quasi public proclamation. It was made as a part of a customary proceeding leading up to the performance of the marriage rite. It may be presumed to have been made upon the authority, in the presence, and with the consent of the deceased, the prospective bridegroom. It may possibly be said to be equivalent to a public declaration by him of his age, and, under a well-recognized rule governing hearsay evidence of this character, since his decease, may be testified to as a declaration made by one competent to testify to pedigree, had he been living. We do not, however, care to be understood as resting our decision on this proposition, and do not do so.

An examination of the entire record satisfies us that the witness was competent for other reasons to testify regarding the age of her husband. While the cross-examination, standing alone, would seem to limit her knowledge to that gained from the publication of the marriage banns, taking all of her evidence, as disclosed by the record, it is manifest that such is not the case. Admitting her first information to be

from an incompetent source, it is apparent that she was qualified to speak regarding the matter testified about from her relationship to her husband, as a member of the family, and because of knowledge gained thereby in relation to the general repute and tradition in the family concerning the birth, age and pedigree of her deceased husband. She had lived with him over twenty years. She says that they at times spoke about their birthdays. It is hardly conceivable that, where the family relations had been sustained for this length of time, a member of such family during the whole of such period was not qualified to speak of matters pertaining to the pedigree of other members of the family of like standing. A birthday may not be an epoch in the life of a person, but it is at least an event, an incident of which note is usually taken by the several members constituting the 640 family. The birthday and the age of an individual can hardly be disassociated. To talk of or discuss the birthday of one, and especially a member of the same family, comprehends ordinarily the age as well as the anniversary. The thought may be suggested in innumerable ways, without a direct discussion of the age as if it were a matter of controversy or doubt. We are quite confident that although the plaintiff says on cross-examination, when her attention was challenged directly to when she first learned his age, she had no other knowledge on the subject than that learned by the publication of the marriage banns, her subsequent membership in the family for over twenty years afforded opportunities for knowledge and information on the subject, wholly outside of and regardless of the knowledge thus first acquired, which well qualified her to testify as to his age, and that such relationship brings her altogether within the rule of law governing the competency of witnesses regarding such matters. The law presumes, and rightly so, that such a member of the family is qualified as a witness to prove the age of other members. It is also disclosed by the record that the parents of the deceased lived in his family, and as members thereof, during nearly the whole of the married life of their son; that the deceased was the oldest son; that he was born in December of the first year of their marriage which occurred in February; that the parents were rounding out fifty years of wedded life and making preparations for the celebration of their golden wedding anniversary a short time prior to the death of the father. It is scarcely believable, under these cir-

cumstances, that the wife of the deceased and daughter in law of the parents was not only presumptively, but actually and in fact, acquainted with the exact age of her deceased husband, and of the family history and tradition, and, of course, qualified to speak on the subject. The plaintiff in her testimony speaks of the wedded life of her husband's parents, the date of their wedding anniversary and the near approach of the golden wedding anniversary. It is, we think, clearly inferable [641] from the record that her relationship to the family, her long membership therein, and her acquaintance with the family history and tradition were such as to qualify her to testify to the pedigree of any member thereof, as was her mother in law or would be her husband had he been living. The rule is uniform that the date of a person's birth may be testified to by members of his family, although they may know of the fact only by hearsay, founded on family tradition. Such evidence is admitted as coming within the rule of hearsay in matters pertaining to pedigree, which embrace not only descent and relationship, but also the facts of birth, marriage and death and the times when they occurred: Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541; 1 Greenleaf on Evidence, 16th ed., sec. 104; Hill v. Eldridge, 126 Mass. 234; Commonwealth v. Stevenson, 142 Mass. 466, 8 N. E. 341; Cheever v. Congdon, 34 Mich. 296.

Treating, for present purposes, the knowledge of the wife gained from the publication of the marriage banns as coming from an incompetent source, we cannot regard this as sufficient grounds for excluding her evidence in chief touching the age of her deceased husband, or for holding her incompetent to testify on the subject. Her competency does not rest on her right to testify to declarations made by those who were qualified to speak when the declaration was made but whose testimony by reason of death or other causes cannot be obtained. Her qualification to speak of the family tradition regarding age, pedigree, etc., is bottomed on her membership of long standing in the family, and the knowledge of matters pertaining to the pedigree of other members acquired thereby. That she did have such general knowledge which renders her competent to testify is, we think, disclosed by the record. The incompetent source of her knowledge first obtained could, at most, be considered only for the purpose of affecting her credibility or the weight to be attached to her evidence. Her competency to testify as a witness has its origin in knowledge

and information coming from [642] other sources and in other respects to which no valid objection applies: Cook v. Carroll Land etc. Co. (Tex. Civ. App.), 39 S. W. 1006. We are, for the reason stated, of the opinion that no error was committed by the trial court in refusing, on the defendant's motion, to strike out all the evidence of the plaintiff touching the age of her deceased husband because of her alleged disqualification.

Other errors are argued by counsel for plaintiff in error in their brief filed in the case, none of which appeal to us as of such a substantial character as to call for a reversal of the judgment entered in the court below. The whole of the controversy centered on the point relating to the age of the deceased. The testimony was directed almost exclusively to this one issue. The court, by its sixth instruction, told the jury that if the age of the deceased, at the time he applied for membership, was found to be above that allowed by the laws of the association, the plaintiff could not recover. This issue of fact was by the jury found against the defendant. While it is urged that the evidence is insufficient to support the verdict, we are satisfied from examination of the record that such is not the case. The wife and the mother of the deceased both testified regarding his age, and from the evidence of both, or either, the inference is fairly justifiable that his age was not misrepresented in his application for the benefit certificate of insurance. While there is some parol and documentary evidence apparently supporting the contention of the defendant, this evidence, as found by the jury, must give way to the positive and direct testimony of the living witnesses qualified to speak on the subject.

The giving and refusing to give certain instructions are also excepted to, but in view of the clear-cut instruction of the court, to which we have referred, submitting the issue of fact in as favorable a light as the defendant could rightfully ask, no prejudicial error was committed in the ruling of the court on the instructions given and refused, of which complaint is made.

Error is also sought to be predicated on the ruling of [643] the trial court in refusing to grant a new trial on the ground of surprise and newly discovered evidence. The evidence which it was sought to procure, and on which the application was based, was in relation to records and documents supposed to be in existence in the foreign country,

from which the family of the deceased and his parents' family emigrated to this country. Such records, it is claimed, would show the ages and date of the marriage of the parents of the deceased, and from these could be determined more accurately the latter's age. We find no ground for entertaining the view that the trial court abused its discretion in respect of the application for a new trial on the grounds advanced therefor. The issue as to the age of the deceased was raised by the pleadings in the case, and regarding which the defendant was advised from the time of the filing of the answer. No effort was made to secure the evidence now sought to be obtained. The evidence is not only in its nature cumulative, but its existence is largely a matter of conjecture or speculation. While it is urged that the defendant was misled by the character of the answer, and was led to believe the plea of waiver would probably be relied on by the plaintiff to avoid the consequences of the alleged misstatement as to age, it is manifest that the issue of fact as to age of the deceased was put directly in issue, and, to maintain its side of the controversy, it was incumbent on the association to make all reasonable effort and exercise due diligence to procure all the evidence in support of such issue reasonably obtainable, and that the evidence now sought to be obtained might, if in existence, have been secured by the exercise of such reasonable effort and due diligence. The court's ruling in respect of the matter now being discussed was, we are disposed to think, proper, and error cannot successfully be predicated thereon. From a consideration of the entire record and of the errors assigned, we arrive at the conclusion that the judgment of the trial court was right and should not be disturbed. [644] The judgment of reversal heretofore entered is vacated, and the judgment of the trial court is affirmed.

PROOF OF AGE OF PERSON.

I. By Person Himself, 584.

II. By Third Persons.
- **a. Testimony of a Third Person, 584.**
- **b. Declarations, 585.**

III. Registry Entries.
- **a. Entries in Bible, 586.**
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IV. Opinion Evidence.
- **a. Generally, 589.**
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I. By Person Himself.

A person, whether a minor or adult, is, from necessity, competent to testify to his own age: Chicago etc. R. R. Co. v. Lewandowski, 190 Ill. 301, 60 N. E. 497; Commonwealth v. Stevenson, 142 Mass. 466, 8 N. E. 341; Cheever v. Congdon, 34 Mich. 296; Houlton v. Manteufel, 51 Minn. 185, 53 N. W. 541; Stevenson v. Kaiser, 29 N. Y. Supp. 1122. And the best evidence of one's age is that of the person whose age is in question: Morrison v. Emsley, 53 Mich. 564, 19 N. W. 187. A witness may testify to his own age without first requiring him to show from what source he derived his information, and when and where he was born. The correctness of his statement may be tested on cross-examination by asking whence he derived his information, and likewise the time and place of his birth; but on such subjects hearsay evidence is admissible from the necessity of the case: Central R. R. v. Coggin, 73 Ga. 689.

A person is a competent witness to prove his own age, whether he derived his knowledge from his mother, from the recognized family record, or from public repute in and out of the family: Pearce v. Kyzer, 16 Lea, 521, 57 Am. Rep. 240. The testimony of a witness as to her age at a given time is admissible in evidence, although her knowledge is derived solely from statements made to her by members of her family: Morrill v. Morgan, 65 Cal. 575, 4 Pac. 580.

A witness is always competent to testify to the reputation in his own family as to his own age: State v. Best, 108 N. C. 747, 12 S. E. 907.

In an action for goods sold and delivered, to which the defense is infancy, the defendant is competent to testify that he was sixteen years of age at the time of the sale: Hill v. Eldredge, 126 Mass. 234. Upon the trial of a person charged with the crime of rape committed upon the person of a girl under the age of fourteen years, her testimony as to her age at the time when the act was committed is competent and admissible, and the fact that her knowledge was derived from statements of her parents, or from family repute, does not render her evidence inadmissible: People v. Ratz, 115 Cal. 132, 46 Pac. 915. Or if, in a prosecution for rape, the prosecutrix states that she knows her age, it is competent for her to testify thereto: Lewis v. State (Tex. Cr. App.), 64 S. W. 240. And a prosecutrix in seduction is competent to testify as to her own age, though her information may have been derived from her parents or other relatives: State v. Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

II. By Third Persons.

a. Testimony of a Third Person.—The proof of the age of a person may generally be made by the testimony of a relative or other person who is in such position as to have personal knowledge of such age. Thus, the date of a person's birth may be testified to by members of his family, though they know the fact only by hearsay based on family tradition: Houlton v. Manteufel, 51 Minn. 185, 53 N. W. 541. The testimony of a person as to the proximate age of his older brother

is not necessarily based on hearsay, and may be legitimate original evidence if the brothers passed their childhood together: Hancock v. Catholic Ben. Legion, 69 N. J. L. 308, 55 Atl. 246. The plaintiff in a personal injury case is competent to testify as to his own age when he signed a release of damages, as is also a relative who has known the plaintiff since he was six years of age, and has been informed by plaintiff's father, who has since died, on what day plaintiff was born. So, also, is a woman who has known plaintiff since he was an infant. Such woman may testify also as to the year in which plaintiff was born: Chicago etc. R. R. Co. v. Lewandowsky, 190 Ill. 301, 60 N. E. 497.

In a prosecution for rape the testimony of the mother and sister of the prosecutrix as to her age is admissible: George v. State, 61 Neb. 669, 85 N. W. 840.

b. Declarations.—Evidence of declarations by persons since deceased as to the age of a member of the family is admissible: Travelers' Ins. Co. v. Henderson Cotton Mills (Ky.), 85 S. W. 1090. Hearsay is admissible as to the age of a person when based upon information derived from relatives of such person when, and only when, such relatives are dead: Donley v. State, 44 Tex. Cr. Rep. 428, 71 S. W. 958. The age of one member of a family may be proved by the information of another member thereof derived from family reputation and declarations of a deceased member of such family, unless it appears that better evidence is in the power of the party: Watson v. Brewster, 1 Pa. St. 381. In Rogers v. De Bardeleben Coal etc. Co., 97 Ala. 154, 12 South. 81, it was held that to let in the declarations of members of a family as to the age of one of them, it must be shown that the member making such declaration is dead, and that testimony of a brother that the reputation in the family was that plaintiff was under twenty-one years of age, is not admissible. But it has also been held that the declarations of a father, made before the cause of action arose, concerning the age of his child, are admissible in evidence to prove such age: David v. Sittig, 1 Mart., N. S., 147, 14 Am. Dec. 179.

In this connection it may not be amiss to state that in an action on an insurance policy against accident, in which the insurer interposes the claim that the insured falsely warranted his age, an affidavit as to such age purporting to have been made by the insured's father, forty-three years before the death of the insured, is not competent in support of the contention of the insured: Bowen v. Preferred Accident Ins. Co., 82 N. Y. App. Div. 458, 81 N. Y. Supp. 840. In such case the depositions of two sisters of the insured, to the effect that he was two years older than the age given by him in his application for the policy, do not conclusively establish the breach of warranty where it appears that neither of the two sisters was born until several years after the insured; that neither of them had any document or record to fortify her memory; that neither of them gave the date of his birth more accurately than a statement of the year; that the insured left home when they were children, aged fourteen and sixteen years, respectively, and that neither of them had lived with the in-

sured or even seen him during the last forty-four years of his life, particularly when it also appears that the insured had no motive in misrepresenting his age: Bowen v. Preferred Accident Ins. Co., 82 N. Y. App. Div. 458, 81 N. Y. Supp. 840.

III. Registry Entries.

a. **Entries in Bible.**—On the question of the date of a person's birth, entries in a family Bible or Testament are admissible, as a general rule, even without proof that they were made by a relative, provided the book is produced from the proper custody: Jones v. Jones, 45 Md. 144. Thus, entries in a family Bible or Testament are generally admissible in evidence without proof that they were made by a parent or relative, as in such case proof of the handwriting or authorship is not required when the book is shown to be the family Bible or Testament: Weaver v. Leiman, 52 Md. 708; Union Central Life Ins. Co. v. Pollard, 94 Va. 155, 64 Am. St. Rep. 715, 26 S. E. 421, 36 L. R. A. 271. But such entries are not in all cases conclusive of the facts stated; their weight as evidence is subject to be weakened or strengthened by all the proof in reference to them, and the questions as to who made the entries, when they were made, and whether the book has been so kept as to be accessible at all times and to all members of the family, are all matters to be considered in determining the probative force of such entries: Weaver v. Leiman, 52 Md. 708. An entry in the family Bible of the date of the birth of a member of the family is in the nature of a record, and, being produced from the proper custody, is itself evidence tending to show such date. Being a family Bible and accessible to all the family, the presumption is that the entry would not be permitted to stand if the whole family did not adopt it, and thereby give authenticity to it: Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715, 26 S. E. 421, 36 L. R. A. 271. Entries made in the family Bible are admissible to show the name of a child and the date of its birth, and the admissibility of the book does not depend upon proof of the handwriting or authorship of the entries, but upon the fact that they are to be taken as assented to by the family in whose custody the book has been, and it is admissible upon proof that it is the family Bible, and such proof may be given by the mother, notwithstanding the entries are in the English language, in which she can neither read nor write: People v. Ratz, 115 Cal. 132, 46 Pac. 915. On a trial for rape, the family Bible of the father of the prosecutrix may be properly introduced in evidence to show the date of her birth, the father having testified, as a predicate therefor, that he made the entry in that Bible within the year of her birth, and that it was correct, and that the Bible had not been out of his possession during all the time since: Simpson v. State, 45 Tex. Cr. Rep. 320, 77 S. W. 819.

A Bible containing a family record, in the handwriting of a deceased daughter, which remained in the possession until her death, and then went into the possession of another daughter, from whom

the witness, a son, got it, is competent evidence on the question of the age of one of the children of that mother.

The fact that the witness states that he did not acknowledge the record as correct, and that his mother said that it was copied by a sister of the witness, and it was not considered correct by the family, does not render the record incompetent as testimony. Such statements of the witness may be considered by the jury in determining the weight to be given to the record, and it is subject to be weakened or strengthened by all the evidence in reference to it: Southern Life Ins. Co. v. Wilkinson, 53 Ga. 536. A family Bible is admissible in evidence upon the question of the age of a child, and where the condition of the entry of birth requires explanation, the entry and explanation are properly submitted to the jury, and will not be considered upon appeal, especially when the positive testimony of the parents as to the age of the child is sufficient, independently of such family record: People v. Slater, 119 Cal. 620, 51 Pac. 957.

Only one case is found in conflict with the rule of the above cases, and the case referred to is decided without any reasoning or citation of authority. In this case it is held that a Bible in which the names and dates of birth of several members of the same family are recorded without proof of when or by whom written, or of the knowledge the writer had of the facts recorded, or that the persons whose names and dates of birth are written therein ever acknowledged it to be an authentic family record, and when the entries in the book are not shown to have been contemporaneous with the facts stated, is not competent proof of the age of any person whose name may be recorded therein: Supreme Council of Golden Star v. Conklin, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449.

It is held in one case that the record of births, made in the family Bible, under the dictation of the mother by one since deceased, several years after the birth of her son, is admissible as evidence to corroborate the mother's statement of the age of her son: Wiseman v. Cornish, 8 Jones, 218. And such record was admitted over objection, and the father and mother allowed to testify to the age of their child in corroboration of the record in People v. Slater, 119 Cal. 620, 51 Pac. 957. But this doctrine is opposed to what must undoubtedly be the better rule, and which is supported by the weight of authority, namely, that entries in a family Bible are admissible in evidence to prove the date of a birth only when primary evidence cannot be obtained. Such entries are secondary evidence, and should be excluded when better evidence is shown to be accessible. They come within the general rule which excludes secondary when primary evidence can be obtained: Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67; citing Leggett v. Boyd, 3 Wend. 376, and Hawkins v. Taylor, 1 McCord, 165. This rule maintains that such entries cannot be received when the mother or father or other declarant is present in court, or within reach of its process: Hawkins v. Taylor, 1 McCord, 165; and if both of the parents of a child have testified on the trial

as to his age, an entry as to such age in the family Bible is not admissible: Smith v. Geer, 10 Tex. Civ. App. 252, 30 S. W. 1108. An entry in a family Bible, it has been held, is not admissible to prove the age of a child until it is shown that no one can be produced in court who is competent and able to testify to the fact, and a case is made justifying the introduction of hearsay evidence: People v. Sheppard, 44 Hun, 565. Upon the trial of a defendant accused of rape, where the mother of the girl is in court, and has testified to her age, an entry made by the mother in a Bible of the date of the girl's birth is not admissible as substantive evidence of that fact. Such testimony is, in its nature, hearsay evidence, and subject to the general rule by which that class of evidence is governed, namely, that the fact sought to be established cannot be otherwise shown, and is incompetent to establish any fact which is susceptible of being proved by witnesses who speak from their own knowledge: People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

b. Registry of Births or Baptism.—A registry of births in the handwriting of a deceased father is admissible to prove the ages of his children: Woodard v. Spiller, 1 Dana, 180, 25 Am. Dec. 139. But a statement as to a child's age in the certificate or registry of his baptism alone is no proof of the date of his birth: Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541. The testimony of a person as to the approximate age of his older brother is not necessarily based on hearsay, and may be legitimate original evidence if the brothers passed their childhood together; and the question whether a person who seeks to overcome such testimony by an entry of baptism in a church registry, indicating that such brother was about six years older than he was according to the testimony, has borne the burden of proof, is a question of fact for the jury: Hancock v. Catholic Ben. Legion, 69 N. J. L. 308, 55 Atl. 246.

c. Miscellaneous Records.—Entries in a hymn-book, proved to be in the handwriting of a parent, or made by direction of a parent, ante litem motam, in the form of a family record, are admissible in evidence to prove the age of a child, where the father and mother are dead, and the child has no near relative in the state: Collins v. Grantham, 12 Ind. 440. Or an entry in an old memorandum of a deceased person, stating the ages of several members of the writer's family, may be given in evidence to prove the age of one of such family who is a witness: Clara v. Ewell, 2 Cranch C. C. 208, Fed. Cas. No. 2790.

In a prosecution for rape a book of original entry, kept by a family physician, found in the possession of the physician's son after his father's death, stating the date and fees charged by such physician for the delivery of the prosecutrix, is admissible in evidence on the issue of her age: Smith v. State (Tex. Cr. App.), 73 S. W. 401. A leaf taken from a soldier's private record-book, after his death, required to be kept by soldiers in the British service, containing the

names of the soldier and his wife, and the names, ages, and places of birth of all of his children, on a printed form designed for uniform army use, is competent evidence to prove the ages of such children: Hunt v. Supreme Council of Chosen Friends, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576. A father claiming that his daughter was a certain age at a certain time is properly allowed to show that, before such time and before any controversy had arisen, he had given her a birthday party, at which there was a cake in her honor, with figures on it indicating her age at the time: Parkhurst v. Krellinger, 69 Vt. 375, 38 Atl. 67.

IV. Opinion Evidence.

a. Generally.—The age of a person is generally provable by the inference or opinion of any competent observing witness who has had adequate opportunities for observation. He should, however, be required to state facts observed and used by him as the basis of his opinion, and the mere opinion of a witness respecting the age of a person from his appearance, unaccompanied by the facts on which such opinion is founded, is not admissible: Morse v. State, 6 Conn. 9. The inquiry must be confined to the effect of the observed appearance upon the mind of the witness himself, and cannot be so extended as to cover the witness' opinion as to what would be the effect of those appearances on the mind of another. Hence a question as to whether, "from physical appearances," a certain person was a minor or appeared so to a person of ordinary observation is not permissible: Koblenschlag v. State, 23 Tex. App. 264, 4 S. W. 888. In accordance with the rule above stated, any witness, after fully stating, so far as practicable, the means of knowledge and the basis of an opinion as to the age of an absent person, should be allowed to give such opinion: State v. Grubb, 55 Kan. 678, 41 Pac. 951.

On a trial for murder one who testifies that he has known the deceased for more than twenty years is competent to further testify to the age of the decedent to the best of his judgment: Winter v. State, 123 Ala. 1, 26 South. 949. And when the issue is whether a person was forty-seven or fifty-seven years of age at a certain time, the court may admit an expression of opinion by a witness as to that age, based on the appearance of such person at the time, accompanied with a description of such appearance, from which the opinion was formed: Elsner v. Supreme Lodge etc., 98 Mo. 640, 11 S. W. 991. A witness who has testified to the personal appearance of a person who pleads infancy at the time of making a contract sued on may be allowed to state his opinion as to the age of the defendant: Benson v. McFadden, 50 Ind. 431. Whether a baby seen by a witness was a new-born babe at a particular time, or one that had been born for some time, is a proper subject for opinion evidence: Stewart v. Anderson, 111 Iowa, 329, 82 N. W. 770. In a bastardy case, turning upon the question whether a child had seen the full or natural period of gestation, a physician professing to be informed on the subject may be allowed

to give his opinion on the question involved, such opinion being based on the appearance of the child at the age of thirteen months: People v. Johnson, 70 Ill. App. 634.

Some cases deny the doctrine of the above cases, and hold that it is improper and not competent to allow a witness to give as evidence his opinion of the age of a person from his appearance in any case: Valley Mutual Life Assn. v. Teewalt, 79 Va. 421; and in Martin v. State, 90 Ala. 602, 24 Am. St. Rep. 844, 8 South. 858, it was decided that when the issue involved is as to whether or not the accused was fourteen years of age at the time of the commission of the crime, a witness who has known him for seven or eight years is incompetent to testify that, in his opinion, the accused was fifteen or sixteen years of age at the time.

b. Minors to Whom Liquor is Sold.—On the trial of a complaint for selling intoxicating liquors to a minor, a witness who testifies to the fact of the sale and the general appearance of the person to whom the sale was made, may give his opinion as to the age of such person: Commonwealth v. O'Brien, 134 Mass. 198; Garner v. State, 28 Tex. App. 561, 13 S. W. 1004. In such cases opinion evidence as to the apparent age of the minor, as indicated by his physical appearance, is legitimate: State v. Douglass, 48 Mo. App. 39; Jones v. State, 32 Tex. Cr. Rep. 108, 22 S. W. 149; Earl v. State, 44 Tex. Cr. Rep. 467, 72 S. W. 175. A witness may testify that he believed from the appearance of certain persons to whom defendant sold intoxicating liquor that they were minors, although he did not know their ages, especially when they lack several years of their majority: State v. Bernstein, 99 Iowa, 5, 68 N. W. 442. Although, on a trial of an indictment for selling liquor to a minor, the defendant is properly allowed to prove that the minor to whom the liquor was sold was a mature looking person, whose appearance was calculated to produce a belief that he had attained his majority, he cannot be allowed to ask a witness "if he would not take him to be over twenty-one years old": Marshall v. State, 49 Ala. 21.

c. Rape Cases.—On a trial for rape, where the age of the prosecutrix is in issue, it is admissible for a witness, who is testifying to her age, to testify to collateral facts and circumstances which tend to impress upon his mind the facts connected with her birth and age. Thus he may state that at a certain time, when she was an infant, she could not have been more than four or five months old, judging from a comparison of her appearance with the child of his brother's wife, who was then on a visit to his father's house, and which last child he knew to be four or five months old at the time: Bice v. State, 37 Tex. Cr. Rep. 38, 38 S. W. 803; Donley v. State, 44 Tex. Cr. Rep. 428, 71 S. W. 958. It is competent to prove by a witness in such case that from his acquaintance with the prosecutrix eight years before, and from her size and appearance at that time, it was his opinion and belief that she was then eight years of age: Donley v. State, 44 Tex. Cr. Rep. 428, 71 S. W. 958. The testimony of a phys-

ician who was well acquainted with the prosecutrix is competent and admissible to the effect that, at the time of the alleged carnal intercourse, judging from the general physical appearance, size and development of the prosecutrix, she was a young woman of the age of seventeen or eighteen years: Bice v. State, 37 Tex. Cr. Rep. 38, 38 S. W. 803. The opinion of medical experts is admissible as to the age of the prosecutrix in such cases: State v. Smith, 61 N. C. 302. It has been decided, however, that in a prosecution for carnally knowing a female child under a given age, opinion evidence is not admissible as to the age of the prosecutrix when she is present and has testified, as in such case the jury can determine for themselves how old she is: State v. Robinson, 32 Or. 43, 48 Pac. 357.

CASES

IN THE

SUPREME COURT

OF

NEW HAMPSHIRE.

McQUESTEN v. STEINMETZ.

[73 N. H. 9, 58 Atl. 876.]

GAMBLING—Place.—One who receives money in one state and transmits it by telegraph to another state, to be there bet on horseraces as directed, does not conduct a gambling or illegal business in the former state. (p. 593.)

Action to recover rent. The facts were agreed upon, and if the business was deemed legal by the court, the plaintiff was to recover; if illegal, the defendant was to have judgment.

I. C. Eaton, for the plaintiff.

G. F. Jackson, for the defendant.

10 BINGHAM, J. It is conceded that this action cannot be maintained if the defendant, with the plaintiff's knowledge and consent, carried on a gambling business upon the leased premises; and that a bet or wager on a horserace is a gambling contract within the meaning of our statute: Pub. Stats., c. 270, secs. 6, 16, 18. The plaintiff, however, contends that the business there carried on was not of this nature; that the wagers or bets in question were not made at Nashua, but in the state of New York; and that what was done at Nashua was lawful.

A bet, like an ordinary contract, involves a concurrence of wills; there must be an offer and acceptance thereof in accordance with its terms, and the acceptance will not be complete until it is actually or constructively communicated to the party making the offer: Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41; Lescallett v. Commonwealth, 89 Va. 878, 17 S. E. 546. It therefore becomes nec-

essary to ascertain where these contracts or bets were made; for if made in New York, the business transacted at Nashua was not in contravention of the statute above cited.

Had it appeared that parties in New York telegraphed proposals offering to bet upon horseraces with persons in Nashua, who accepted the same by telegraph, the contracts would be completed at Nashua when the messages of acceptance, directed to the parties in New York, were delivered at the telegraph office: Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41; Perry v. Dwelling-house Ins. Co., 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731; Lescallett v. Commonwealth, 89 Va. 878, 17 S. E. 546. But the case discloses that the transactions were not so conducted; that the defendant, acting as agent for persons at Nashua, upon receipt of their money, telegraphed it to various persons in New York, who there wagered the money as directed. Under these circumstances the bets were made in New York, and the business conducted by the defendant at Nashua was lawful. Whether a different result would be reached if it appeared that betting on horseraces in New York was illegal, it is unnecessary to consider.

Some states have enacted laws prohibiting persons from receiving money to be transmitted to places within or beyond their limits, to be bet on horseraces (see State v. Harbourne, 70 Conn. 484, 66 Am. St. Rep. 126, 40 Atl. 179, 40 L. R. A. 607; State v. Stripling, 113 Ala. 120, 21 South. 409, 36 L. R. A. 81); but we are not aware of any such statute in this state.

In accordance with the agreement in the case, the order is, judgment for plaintiff for $66.66.

All concurred.

Wagers and their validity are discussed generally in the note to Bernard v. Taylor, 37 Am. St. Rep. 697-704; and bets and wagers are defined and distinguished in Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 106 Am. St. Rep. 586. In order to constitute the crime of dealing in futures, the accused must conduct a business where future contracts are bought and sold within the state; if the evidence shows that the accused received offers for the sale and purchase of staples, and conveyed such offers to persons outside the state, where they were accepted and the sale and purchase made, he is not guilty: Scales v. State, 46 Tex. Cr. Rep. 296, 108 Am. St. Rep. 1014. As to violations of a statute prohibiting the transmission of money by telegraph to bet on races, see State v. Harbourne, 70 Conn. 484, 66 Am. St. Rep. 126.

ATTORNEY GENERAL v. REMICK.

[73 N. H. 25, 58 Atl. 871.]

PARLIAMENTARY LAW—Presiding Officers.—The nature and extent of the authority of a city mayor as presiding officer of its council can only be determined by such principles of parliamentary usage as are generally adopted or observed in deliberative assemblies, and which are reasonably essential to the due execution of the legitimate business of the council. (pp. 594, 595.)

PARLIAMENTARY LAW—Power of Presiding Officer.—The power of the mayor of a city as presiding officer of its council is not absolute and original, but qualified and derivative. It is his duty to declare the will of the body over which he presides, ascertained by rules previously adopted, or in the absence of such valid rules, by other methods not repugnant to the due and orderly procedure of a deliberative body. (p. 595.)

PARLIAMENTARY LAW—Presiding Officers—Power to Adjourn Meeting.—The presiding officer of a legislative assembly has no power to arbitrarily declare an adjournment of a meeting thereof, without the consent of a majority of the members, unless he has exhausted all his legitimate powers for preserving order before declaring the adjournment, or unless the meeting is in such a state of disorder and excitement that the transaction of business is impracticable. (pp. 597, 598.)

PARLIAMENTARY LAW—Illegally Adjourned Meeting—Power of Remaining Members.—If a meeting of a city council is illegally adjourned by its presiding officer, who withdraws, a quorum of the members of the council may elect a chairman and temporary clerk for that meeting, and proceed with the transaction of such business as the council is authorized to transact. (p. 598.)

OFFICERS—Removal—Vacancy.—If a city council has power to elect a city clerk and remove him at pleasure, a vote of the council declaring a vacancy in such office operates as a removal therefrom, when it is the apparent intention to remove the incumbent. (p. 598.)

OFFICERS—Failure to Take Oath.—Although a person chosen as temporary clerk of a city council does not take an oath of office, this does not invalidate the proceedings of the meeting of the council. (p. 599.)

S. W. Emery, for the plaintiff.

J. S. H. Frink and W. F. Russell, for the defendant.

27 WALKER, J. One of the powers conferred upon the mayor by the charter of the city of Somersworth is that of presiding "in the meetings of the city council": Laws 1901, c. 209, sec. 1. The nature and extent of his authority as the presiding officer of the council, in the absence of rules of procedure adopted by the council and of statutory provisions upon the subject, can only be determined by such principles of parliamentary usage as have been generally adopted or observed in deliberative assemblies, and which are reason-

ably essential to the due execution of the legitimate business of the council: Hiss v. Bartlett, 3 Gray, 468, 63 Am. Dec. 768; Cushman on Leg. Ass., sec. 791; 1 Dillon on 768; Cushman on Legislative Assemblies, sec. 791; 1 Dillon on Municipal Corporations, 4th ed., sec. 288; Reed on resents the assembly in determining and declaring its will upon matters properly before it. If it has adopted rules of procedure which are legally unobjectionable, it is his duty to apply and enforce them. If it has not enacted a code of rules, he is still bound by the legally expressed will of the assembly, ascertained from competent evidence. His power is not ordinarily absolute and original, but qualified and derivative. It is his duty to declare the will of the body over which he presides, ascertained by rules previously adopted, or, in the absence of such rules, by other methods not repugnant to the due and orderly procedure of a deliberative body. In the latter case it may happen that general parliamentary usage affords in the particular instance the only practical method of ascertaining and declaring the legislative purpose. While it may be true that the city counsel of Somersworth is not bound by parliamentary law as recognized and applied in the state legislature or in Congress (Hill v. Goodwin, 56 N. H. 441, 447, 453), it is nevertheless a legislative body; and its legislative acts, if valid, must be disclosed in a manner consistent with legislative procedure. "It is important that the will of the lawmakers be clearly expressed, but it is also essential that it be expressed in due form of law": Cooley's Constitutional Limitations, 7th ed., 186. If all the members should sign a writing declaring their assent to a proposed ordinance, without other formality, the ordinance would not be adopted, because no legislative action was taken; and the presiding officer could not ascertain the will of the board, and declare the same, from non-legislative evidence of that character, however conclusive such evidence might be of the individual wishes of the members. It is obvious that at the meetings of March 22d and 25th, the city council, including the mayor in his capacity of presiding officer, was not independent of all rules of procedure, or that its acts can be found to be legal if adopted through methods not reasonably adequate to the expression of the legislative will.

Whether the defendant has a legal title to the office of city
as clerk, which is the question raised by this proceeding, de-

pends upon the question whether the relator was legally elected to that office at the meeting of the council of March 25th. It is conceded that the defendant was duly elected city clerk in March, 1903, for one year, and that he thereupon legally assumed the duties of the office, which he has ever since performed. Nor is it contended that he was not authorized to perform the duties of the office after the failure of the city council to elect a clerk in March, 1904; for the charter provides that his "term of office shall continue for one year and until another shall be chosen and qualified to act in his stead, removable, however, at the pleasure of the city council": Laws 1901, c. 209, sec. 5. It is plain, therefore, that he was the legal city clerk until the relator was declared elected on March 25th. Up to that time no action had been taken affecting his official title.

The meeting of the council on that day was a legally adjourned meeting; but the position of the mayor and four of the councilmen was, that a successor to the defendant as clerk could not be elected at that meeting, while six of the councilmen took the opposite position. But it is unnecessary to decide this controversy, for before the mayor withdrew from the meeting no one had been elected city clerk in the place of the defendant. Upon the construction most favorable to the defendant, it had merely been determined not to proceed at that meeting with the election of a city clerk, under existing circumstances, and not to adjourn until some further business had been attempted. The office of city clerk was still filled by the defendant.

At this point in the proceedings, the mayor, without a motion being addressed to him to adjourn and without submitting the proposition to the council for their action, upon leaving the platform, said, "This meeting is adjourned." That a presiding officer, who is merely the agency through which the assembly declares its will, does not ordinarily have the power of arbitrarily adjourning the meeting of his own motion, is a proposition which demands little, if any, discussion. While there is no statutory provision defining his duties in this respect, common parliamentary custom or law necessarily forbids such action on the part of a presiding officer of a legislative assembly. To uphold such procedure would be to sanction his usurpation of the undoubted rights and privileges of the assembly. Unless the assembly acquiesces in an arbitrary announcement of an adjournment

by the chairman, it would seem to be difficult to sustain such action, except upon the ground that the attending circumstances were of a very extraordinary character. If it appeared that there was great turmoil and disorder, and that the members, or a substantial part of them, refused [29] to respond to the efforts of the chairman to preserve order, an adjournment might result as a necessary consequence of the situation; and the announcement of the chairman that the meeting was adjourned, without a motion being made for that purpose, might be deemed a valid exercise of his implied power. The occasion might be so urgent as to make such action necessary. Indeed, it has been said by a writer on parliamentary procedure: "Should the disorder become so great that business cannot be transacted, and the chairman cannot enforce order, as a last resort he can declare the assembly adjourned": Roberts' Rules of Order, sec. 40, note. An urgent necessity arising from the attendant circumstances would seem to be the only justification for such action, in the absence of statutory authority or special rules of procedure. Whether the disorder is so great that the assembly ceases to be a deliberative body and loses its ability to perform legislative functions, and whether the chairman is unable to preserve such a degree of order as is necessary for the transaction of legislative business, are principally questions of fact.

From the facts reported in this case it is apparent that there was some disorder at the meeting, and that the rightful authority of the mayor as the presiding officer was not respected by all the members. His attempt to call the member to order, who was assuming to act as chairman in putting a motion to a vote was disregarded by the member, who, it is not improbable, thus became liable to discipline and censure. But, however reprehensible and unparliamentary his conduct may have been, it does not appear that the mayor might not have preserved order and compelled the disorderly member to desist by such reasonable means as he had the power to employ—as, if necessary, by ordering his removal from the room. It does not appear that the mayor exhausted all his legitimate powers for preserving order before declaring the meeting adjourned, or that the meeting was in such a state of disorder and excitement that the transaction of business was impossible or impracticable. It does not appear, therefore, that the exigency had arisen which might have authorized him to exercise the extraordinary power of

adjourning the meeting without the consent of a majority of the members, who had no opportunity to dissent, and who, therefore, did not acquiesce in the declaration of the mayor. It follows that the meeting was not legally adjourned when the mayor, clerk and four of the members withdrew.

Under such circumstances it was competent for the remaining members, who constituted a quorum, to elect a chairman and a temporary clerk for that meeting, and to proceed with the transaction of such business as the council was authorized to transact. The vote declaring the office of city clerk vacant was legal. [30] The apparent purpose was to remove the incumbent; the members understood that the effect of passing that vote would be the removal of the defendant and the consequent creation of a vacancy: Attorney General v. Remick, 71 N. H. 480, 53 Atl. 308. If the vote had been to declare the office vacant by the removal of the defendant, the members would not have furnished clearer evidence of their intention than they did in the vote actually passed. If it is true that in a technical sense the declaration of the council declaring the office vacant did not create a vacancy if one in fact did not exist (Harrison v. Simonds, 44 Conn. 318; People v. Van Horne, 18 Wend. 515; Tappan v. Gray, 9 Paige, 506; State v. Davis, 45 N. J. L. 390; Hedley v. Commissioners, 4 Blackf. 116; State v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; Doran v. De Long, 48 Mich. 552, 12 N. W. 848; State v. Seay, 64 Mo. 89, 27 Am. Rep. 206; Page v. Hardin, 8 B. Mon. 669; People v. Osborne, 7 Colo. 605, 4 Pac. 1074; People v. Tilton, 37 Cal. 614; Mechem on Public Officers, secs. 128, 129), still it may have had the effect of a removal, if such appears to have been the intention. When the body declaring a vacancy has also the power of removal at pleasure and the power of appointment, its action is susceptible of a broader construction than it is when it has merely the power of appointment in case of a vacancy, as in most of the cases above cited. The legislature has expressly authorized the city council of Somersworth to remove the city clerk at pleasure: Laws 1901, c. 209, sec. 5. By section 2 it is provided that "all provisions of statutes pertaining to the duties of boards of aldermen and common councils of cities, separately or otherwise, shall be construed to apply to the board of council created by this act unless a different intention appears." As no "different intention" appears, section 4, chapter 50 of the Public Statutes applies,

which authorizes city councils to fill "all vacancies in any office to which they have power to elect." Having the undoubted power to remove the clerk and to fill the vacancy thus created, the question is whether the council has furnished competent evidence of a legislative intention to exercise those powers. If the vote declaring a vacancy did not operate as a removal of the defendant, it had no effect. But action of a deliberative body is not to be deemed ineffectual and useless, when by reasonable construction a lawful purpose is apparent and the language used is not necessarily inconsistent with the expression of such a purpose. "Thus, if by one construction an ordinance will be valid, and by another void, the courts will, if possible, adopt the former": 1 Dillon on Municipal Corporations, sec. 420; Town of Lisbon v. Clark, 18 N. H. 234. The vote declaring the office of city clerk vacant was in effect a removal of the incumbent (Williams v. City of Gloucester, 148 Mass. 256, 19 N. E. 348), and the vacancy thus created was properly filled by the election of the relator.

[31] If it is argued that the council acquiesced in the mayor's veto of the vote to proceed to the election of a clerk in the early part of the meeting, or in his subsequent ruling that such a motion was out of order, and that for some parliamentary reason that proposition could not be again acted upon at that meeting, and if it is assumed, without deciding, that the argument is sound, the answer is that the removal of the defendant was a new proposition that had not been before presented to the meeting, and that upon its adoption a new situation had arisen with reference to the office of city clerk. The circumstances were materially different from what they were in the early part of the meeting. A vacancy had occurred by removal, as it might have occurred by the incumbent's death or resignation. Under such circumstances it cannot be doubted that the council was at liberty to proceed to elect a clerk to fill the vacancy, however created.

This result is based upon the theory that the proceedings of the council were properly recorded. The fact that the temporary clerk was not sworn does not render the proceedings void (1 Dillon on Municipal Corporations, sec. 293), while no question seems to have been raised as to the competency of the evidence presented. Upon the facts reported the order is judgment of ouster.

All concurred.

Authority conferred by law upon an executive to fill vacancies in office by appointment does not confer upon him the power of ultimately determining whether the vacancies actually exist, and a claimant has the right to have such question determined in the courts: **State v. Harrison, 113 Ind. 234, 3 Am. St. Rep. 663.**

STATE v. DANFORTH

[73 N. H. 215, 60 Atl. 839.]

EVIDENCE—Exhibiting Infant to Show Paternity.—On a trial for rape, a child whose paternity is in controversy may be exhibited to the jury, and counsel may properly direct attention to features peculiar to both the infant and the defendant, and to a general resemblance between them. (p. 601.)

EVIDENCE — Paternity—Comparison of Child with Putative Father.—The question whether the evidence furnished by a comparison of a child with its putative father is sufficiently definite to have weight upon the issue of paternity in a particular case, is a question of remoteness determinable by the trial court. (pp. 603, 604.)

CRIMINAL TRIALS—Evidence.—The general rules as to the admissibility of evidence are the same in criminal as in civil proceedings. (p. 605.)

CRIMINAL LAW—Presumptions.—It is presumed that a defendant on trial exercised his right and offered himself as a witness, and made himself a subject of cross-examination and comment. (p. 605.)

TRIAL—Improper Conduct of Counsel.—A finding by the trial court that the trial was not rendered unfair by alleged misconduct of counsel is conclusive. (p. 606.)

NEW TRIAL.—Whether Justice Requires that a new trial be had upon the ground of newly discovered evidence is a question of fact for the trial court. (p. 606.)

NEW TRIAL.—Evidence which simply tends to impeach a witness for the state and does not go to the merits of the case does not authorize the court to order a new trial. (p. 606.)

NEW TRIAL.—Newly Discovered Evidence to justify a new trial must be material to the issue joined and to the point to be decided by the verdict and not collateral. It must go to the merits of the case, and not to discredit or impeach a former witness. (p. 606.)

W. D. Veazey and E. P. Jewell, for the state.

Shannon & Tilton, for the defendant.

216 PARSONS, C. J. "Evidence is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact": Cook v. New Durham, 64 N. H. 419, 13 Atl. 650. The defendant is charged with

rape upon a woman child under the age of sixteen years. The birth of the child conclusively established a prior act of intercourse. The fact was relevant upon the issue tried. The state could not be confined to proof by oral testimony, and excluded from presenting the child to the jury as evidence tending to establish the fact of birth and prior unlawful intercourse. It was the right of the state to prove its case by competent evidence from all sources: Cook v. New Durham, 64 N. H. 419, 13 Atl. 650. There was no error in exhibiting the child to the jury.

It is contended that error was committed in permitting counsel for the state to call attention to peculiarities in the features of the child and the defendant and to a general resemblance between [217] them. The birth of the child, if found by the jury, established the commission by some one of the crime charged. If the defendant was the father of the child, his guilt was proved. Any evidence tending to establish that relationship was relevant. The issue was paternity, precisely as in a prosecution for bastardy.

"The practice of bringing before the jury, on trials for bastardy, the child whose paternity is sought to be established, when living, has been almost universal in this state from the earliest recollection of the oldest practitioners": Gilmanton v. Ham, 38 N. H. 108. This practice, recognized by the court in 1859, has continued to the present time: State v. Saidell, 70 N. H. 174, 85 Am. St. Rep. 627, 46 Atl. 1083. In the latter case, decided in 1899, it was said: "The comparison of the child with the defendant as an individual, or with his race, was properly allowed"; and the ground upon which such comparison is permitted was placed upon the reasons advanced in Gilmanton v. Ham, that "under the well-established physiological law that like begets like, and that generally there is a resemblance, more or less strong or striking, between the parent and his child, it was a fair matter of argument before the jury by the counsel on both sides, whether or not there had been anything in the complexion, appearance, and features of the child which the witness had produced and identified before them tending to indicate its other parent."

It is urged that the rule of this court, as recognized in Gilmanton v. Ham, 38 N. H. 108, and State v. Saidell, 70 N. H. 174, 85 Am. St. Rep. 627, 46 Atl. 1083, is erroneous and against the weight of authority elsewhere. Time has, there-

fore, been taken to examine the authorities generally, although the rule upon the cases referred to, appears firmly established in this jurisdiction.

In Andrews v. Askey, 8 Car. & P. 7, an action for seduction, counsel relied in corroboration of the plaintiff upon the likeness of the child to the defendant. In Morris v. Davies, 3 Car. & P. 215, an issue to determine whether the plaintiff was the son of William and Mary Morris, the defendants claimed the plaintiff was the fruit of an adulterous intimacy between Mary Morris and one Captain Austin. "And the defendants' counsel much relied on the circumstance of the personal resemblance that was proved by several witnesses to exist between him and the captain": 3 Car. & P. 217. In the latter case, in the house of lords (5 Car. & P. 163, 239) the same argument was made, reliance being had upon the oft-quoted observation of Lord Mansfield in the Douglas case: "I have always considered likeness as an argument of a child's being the son of a parent": 1 Beck. Med. Jur. 651; Hub. Suc. *384. No suggestion appears to have been made that evidence of resemblance was not competent, and in that case it appears to have been regarded as evidence of a very convincing [218] character: Camp. Ld. Ch., c. 144, ad fin., and note. When the fact of resemblance is satisfactorily established, Mr. Justice Heath is said to have told the jury in Day v. Day (Huntingdon Ass. 1797) "It was impossible to have stronger evidence": Hub Suc. *384. It is also said that in 1871, in the Tichborne case, Lord Chief Justice Cockburn held that the resemblance of the claimant to a daguerreotype of Robert Tichborne was relevant, and intimated that comparison of features between the claimant and sisters of Arthur Orton would be permitted: Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600; Warlick v. White, 76 N. C. 175, 8 Am. Law Rev. 381, 411. Cases which hold that witnesses cannot be permitted to testify to the fact of resemblance generally concede that if the fact be proved by the presence of the parties, in court, or by photography, it is competent for the jury to consider the fact: In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, 596; Shorten v. Judd, 56 Kan. 43, 54 Am. St. Rep. 587, 42 Pac. 337; Jones v. Jones, 45 Md. 144.

It appears to be universally conceded that a resemblance between the parties, properly proved, is some evidence upon the issue. The cases upon which the defendant relies do not con-

test this proposition, and concede that even in the case of young children, if dissimilarity of race is involved, comparison in the presence of the jury is proper: Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56; State v. Saidell, 70 N. H. 174, 85 Am. St. Rep. 627, 46 Atl. 1083. The argument advanced in these cases is founded upon the alleged physiological fact, considered matter of law as matter of common knowledge, that "during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period": Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56. In that case the child was six weeks old. In Hanawalt v. State, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489, the child exhibited to the jury was less than a year old, and the court say of the fact of resemblance, "when applied to the immature child, its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the jury." In the Indiana cases cited by the defendant the incompetency of the evidence furnished by the exhibition of the child is assumed: Risk v. State, 19 Ind. 152; Reitz v. State, 33 Ind. 187; La Matt v. State, 128 Ind. 123, 27 N. E. 346. In Iowa, in State v. Harvey, 112 Iowa, 416, 84 Am. St. Rep. 350, 84 N. W. 535, 52 L. R. A. 500, it was held that a child nine months old could not properly be offered as evidence of its resemblance to the defendant. The same was held as to a child three months old in State v. Danforth, 48 Iowa, 43, 30 Am. Rep. 387, while in State v. Smith, 54 Iowa, [219] 104, 37 Am. Rep. 192, 6 N. W. 153, it was held that a child two years and one month old might be shown to the jury.

All the authorities concede, in effect, that there may be cases in which the maturity of the child, or the character of the peculiarities relied upon as a ground of resemblance or dissimilarity, render the child competent evidence on the issue of paternity. The objections urged to the competency of the evidence go rather to its weight than to its relevancy. When comparison is made to determine a difference of race or otherwise, greater weight may properly be given to the evidence; but the ground of its relevancy is the same as when the comparison is between individuals. The objection resting upon the immaturity of the child is merely to the definiteness of

the proof. If all individuals developed by a fixed rule, it might be possible to fix upon a certain age below which the child should not be exhibited as evidence on this issue. If there were such an age, its scientific determination would involve the finding of a question of fact upon physiological evidence—an investigation which this court has no means or power to make. Whether the features of a child are sufficiently developed to authorize its use as evidence by comparison with the alleged parent, is purely a question of fact. A court of law cannot determine this question of fact, as a rule of law, without evidence, upon their personal impressions, without basing their judgment upon a "vague, uncertain and fanciful" foundation. Conceding that resemblance properly proved is an evidentiary fact competent for consideration in connection with other evidence upon the issue of paternity, and that in certain instances or situations the individuals themselves may furnish evidence of such resemblance, the question whether the evidence offered by one of the individuals—the child—is sufficiently definite to have weight on the question in a particular case is a question of remoteness determinable at the trial term: Pritchard v. Austin, 69 N. H. 367, 46 Atl. 188; Morrill v. Town of Warner, 66 N. H. 572, 29 Atl. 412.

No error of law was committed at the trial. Whether the rejection of such proof of resemblance upon the ground of immaturity of features in the child, found as a fact by the trial court, would constitute error of law in this jurisdiction, is a question not presented. It is said in a recent work that "the sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications": 1 Wigmore on Evidence, sec. 166. This rule appears reasonable, avoiding the strongest objections raised to this class of evidence, and to be in accord with the general practice here as to evidence of such varying character. Whether it should be here followed is a question which the present case does not raise for decision.

[220] United States v. Collins, 1 Cranch C. C. 592, Fed. Cas. No. 14,835, cited by the defendant, is the report of a jury trial in which the presiding judge refused to admit the testimony of witnesses to prove the likeness between the defendant and the child. The grounds of the exclusion are not stated. In State v. Neel, 23 Utah, 541, 65 Pac. 494, cited in argu-

ment, it does not appear that the child was introduced for purposes of comparison or the resemblance argued, although it is said this could not be done. The suggestion that if evidence of this sort is laid before the jury the court of law will be unable to pass upon the question whether there was any evidence, is not entitled to serious consideration. If sound, it would preclude the jury from considering in any case any evidence except what can be reduced to writing.

The cases on the subject are quite fully collected in Wigmore on Evidence (volume 1, section 166) and in a note to State v. Harvey, 112 Iowa, 416, 84 Am. St. Rep. 350, 84 N. W. 535, 52 L. R. A. 500; and the conclusion of the authors that the weight of authority coincides with the rule of this court appears to be sustained by an examination of the cases: Finnegan v. Dugan, 14 Allen, 197; Scott v. Donovan, 153 Mass. 378, 26 N. E. 871; Farrell v. Weitz, 160 Mass. 288; Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600; Jones v. Jones, 45 Md. 144; State v. Woodruff, 67 N. C. 89; State v. Horton, 100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238; Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687; Paulk v. State, 52 Ala. 427; Kelly v. State, 133 Ala. 195, 91 Am. St. Rep. 25, 32 South. 56; Crow v. Jordon, 49 Ohio St. 655; People v. Wing, 115 Mich. 698, 14 N. W. 179; In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Marr v. Marr, 3 U. C. C. P. 36.

The general rules as to the admissibility of evidence are the same in criminal as in civil proceedings. Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600, above cited, was an indictment for fornication, in which the question is fully considered. The objection that the defendant was compelled to furnish evidence against himself is without foundation. It does not appear that he was required to do anything. As it does not appear that he did not testify, it is to be presumed he exercised his right and offered himself as a witness before the jury, and made himself a subject of cross-examination and comment: State v. Ober, 52 N. H. 459, 13 Am. Rep. 88.

If the counsel for the state kissed the child in the presence of the jury, a charge which counsel denies and which is not found to be true, such act had no tendency to prove that the defendant was the father of the child—the point in controversy—or that counsel thought so. As evidence, the act was clearly immaterial. Being immaterial, the verdict cannot be affected by the bad taste of such an exhibition unless the

spectacle tended clearly to prejudice the jury against the defendant. If what the jury saw tended to create in their minds sympathy for the child, it is not clear how [221] the result of sympathy so evoked could prejudice them against the defendant in this proceeding, however the fact might be in a proceeding for bastardy. It could not aid the child to convict the father of rape. A verdict is not set aside for the admission of incompetent, immaterial evidence not calculated to prejudice the losing party: Smith v. Morrill, 71 N. H. 409, 52 Atl. 928. The ruling of the court refusing to hear evidence as to the alleged misconduct of the state's counsel, upon the ground that the act (if it occurred) was not prejudicial to the respondent, if understood as a ruling of law, was without error; while if the holding were intended as a finding of fact that the trial was not rendered unfair, such finding is decisive: Furnald v. Burbank, 67 N. H. 595, 30 Atl. 409.

Whether justice requires that a new trial should be had upon the ground of newly discovered evidence, is a question of fact for the trial court: Ela v. Ela, 72 N. H. 216, 55 Atl. 358. Evidence which "tended simply to impeach the state's witness and did not go to the merits of the case" would not authorize the court to order a new trial: State v. Carr, 21 N. H. 166, 51 Am. Dec. 179; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97. To justify such an order the newly discovered evidence "must be material to the issue joined, material to the point to be decided by the verdict, and not collateral. It must go to the merits of the case, and not to discredit or impeach a former witness": State v. Carr, 21 N. H. 166, 51 Am. Dec. 179. The evidence offered directly contradicted the prosecutrix as to her associations with other men, and tended to impeach and discredit her. If it had a tendency to prove intercourse with other men, such acts, if proved, would not establish that the defendant was not guilty. The defendant claims in argument that the state's case rested on the claim of exclusive opportunity on the part of the defendant. If by the course of the trial this question became a material point to be decided by the verdict, the evidence offered, if made definite in time, might have some bearing thereon. If the jury believed the prosecutrix had borne a child, and that the defendant was the only person with whom she could have had intercourse, the case against the defendant was made out. Evidence showing that another had such opportunity and might be the progenitor of the child ex-

hibited to the jury would be material and might be important. But the case contains no statement of fact justifying the claim of the defendant, and the new evidence reported lacks the element of time essential to render it relevant upon the question of the paternity of the child. As the case is before the court, the only tendency of the evidence was, as ruled, to impeach the state's witness.

Exception overruled.

All concurred.

In a Prosecution for seduction, or in bastardy proceedings, a child may be compared with the defendant, on the issue of establishing the paternity of the child: State v. Saidell, 70 N. H. 174, 85 Am. St. Rep. 627; State v. Horton, 100 N. C. 443, 6 Am. St. Rep. 613; note to Weatherford v. Weatherford, 56 Am. Dec. 218. It has been held, however, that on a prosecution for bastardy, the exhibition of a child only six weeks old to the judge, or the exhibition of a child nine months to the jury, for the purpose of showing its resemblance to the defendant, cannot be allowed: State v. Harvey, 112 Iowa, 416, 84 Am. St. Rep. 350; Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221. But a child of two years and one month may be so exhibited: State v. Smith, 54 Iowa, 104, 37 Am. Rep. 192.

HODSDON v. KENNETT.

[73 N. H. 225, 60 Atl. 686.]

LICENSE—Revocability.—A parol sale of standing timber is only a license to enter, cut and remove it, and such license may be revoked so that acts done thereafter on the land by the licensee may constitute a trespass. (p. 607.)

LICENSE—Revocation by Death.—A parol license to enter land and cut timber standing thereon is revoked by the death of the grantor of such license. (p. 608.)

F. Weeks, for the plaintiff.

A. L. Foote, for the defendants.

225 WALKER, J. The attempted sale of the wood and timber on the lot by Sanborn to Kennett and Weeks, even if assented to by his cotenant Hodsdon, had no other effect than to confer upon the vendees a license to enter upon the lot and cut and remove the growth, since the subject matter of the sale was an interest in real estate, which cannot be conveyed by parol: Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec.

173; Howe v. Batchelder, 49 N. H. 204; Reid v. McQuesten, 61 N. H. 421; Dudley v. Foote, 63 N. H. 57, 56 Am. Rep. 489; Lamprey v. Eastman, 68 N. H. 198, 34 Atl. 741. Such a license may be revoked at any time; and acts done upon the land by the licensee after revocation, and without other rightful authority, render him liable as a trespasser: Marston v. Gale, 24 N. H. 176; Houston v. Laffee, 46 N. H. 505; Batchelder v. Hibbard, 58 N. H. 269; Quimby v. Straw, [226] 71 N. H. 160, 51 Atl. 656. By the death of Sanborn, whatever authority he gave the licensees to enter upon the land and cut the timber was revoked (Blaisdell v. Portsmouth etc. R. R., 51 N. H. 483; Hallett v. Parker, 68 N. H. 598, 39 Atl. 433), and in two or three days thereafter the plaintiff exercised his right of revocation by expressly notifying them not to cut the wood and timber. Their permissive right then ceased, and they became trespassers in reference to their acts subsequently done upon the land. As the case is understood, those acts consisted in clearing the lot, for which the plaintiff seeks to recover. According to the provision of the case, the plaintiff is entitled to judgment for three hundred and fifty dollars.

Case discharged.

All concurred.

Contracts for the Sale of Timber are usually regarded as within the statute of frauds. Some authorities take a different view, however, at least if an immediate removal of the trees is comtemplated: Emerson v. Shores, 95 Me. 237, 85 Am. St. Rep. 404, and cases cited in the cross-reference note thereto. A sale of wild grass is held within the statute in Kirkeby v. Erickson, 90 Minn. 299, 101 Am. St. Rep. 411.

A Parol License to enter upon or use land may generally be revoked at the pleasure of the licensor: Huber v. Stark, 124 Wis. 359, 109 Am. St. Rep. 937; Entwhistle v. Henke, 211 Ill. 273, 103 Am. St. Rep. 196; Ewing v. Rhea, 37 Or. 583.

JOHNSON v. MARYLAND CASUALTY COMPANY.

[73 N. H. 259, 60 Atl. 1009.]

PRINCIPAL AND AGENT—Knowledge of Agent.—The principal in an insurance policy is chargeable with the knowledge of his agent of the terms of the contract made for him by such agent. (p. 609.)

INSURANCE—Knowledge of Conditions—Presumption.—One who applies for and accepts an insurance policy is presumed, in the absence of fraud or imposition, to have had notice of, understood, and agreed to, and to be bound by, the terms, limitations and conditions contained therein. (p. 610.)

INSURANCE—Conditions.—Parties to an insurance contract have a right to incorporate therein such conditions as appear to them to be proper. (p. 610.)

INSURANCE—Conditions as to Payment of Loss.—Insurers have a right to designate in their contracts of insurance the terms upon which they will be responsible for losses, and they are liable only upon the conditions expressed in the policies. (p. 610.)

INSURANCE, ACCIDENT—Conditions—Notice of Injury.—If an accident insurance policy provides that no recovery can be had thereunder unless notice of the claim be given within ten days of the injury, the insured who fails to comply with such provision cannot recover, when his only excuse for noncompliance is his ignorance of the existence of the policy. (p. 611.)

INSURANCE—Construction of Contract.—In construing insurance policies courts are governed by the general rules applicable to other written contracts, and it is the duty of the court to adopt that construction which best corresponds with the intention of the parties. (p. 611.)

Batchellor & Mitchell, for the plaintiff.

G. F. Morris, for the defendants.

260 PARSONS, C. J. The defendants do not contend that the plaintiff's father, George L. Johnson, was not authorized, as the plaintiff's agent, to negotiate the policy of insurance in suit and to complete the contract by acceptance of the policy upon its delivery to him. If he had not such authority, there was no contract between the parties to this suit: Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41; Perry v. Dwelling House Ins. Co., 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731; Tasker v. Kenton Ins. Co., 59 N. H. 438. If George L. Johnson had authority as the plaintiff's agent to complete the contract by accepting the policy, his acceptance was the plaintiff's acceptance, and the case stands as if the policy had been delivered to and accepted by the plaintiff. He is chargeable with the knowledge of his agent of the terms of the contract made for him by the agent:

Morrison v. Insurance Co. of North America, 64 N. H. 137, 7 Atl. 378; Tasker v. Kenton Ins. Co., 59 N. H. 438; Patten v. Merchants' etc. Ins. Co., 40 N. H. 375. Whether the father's agency for the son was created by prior authorization or subsequent ratification, the son can maintain his suit only upon the ground that the contract his father made for him was his contract. From the plaintiff's "acceptance of the policy and his [261] commencement of a suit upon it, it must be held, in the absence of fraud or imposition, that the plaintiff had notice of, understood, and agreed to, and is bound by the terms, limitations and conditions contained therein": Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 Atl. 502; Davis v. Aetna etc. Ins. Co., 67 N. H. 335, 39 Atl. 902; Brown v. Massachusetts etc. Ins. Co., 59 N. H. 298, 47 Am. Rep. 205.

In the absence of statutory prohibition, the parties had the right in an insurance contract, as in any other contract, to incorporate into their agreement such conditions as appeared to them proper: Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 Atl. 502; Boardman v. New Hampshire etc. Ins. Co., 20 N. H. 551. The contract for insurance is a voluntary one, and the insurers have the right to designate the terms upon which they will be responsible for losses: Riddlesbarger v. Hartford Fire Ins. Co., 7 Wall. 386, 19 L. ed. 257. They "are liable only in accordance with the terms and stipulations expressed in their contract as the conditions of their liability": Moore v. Phoenix Ins. Co., 62 N. H. 240, 13 Am. St. Rep. 556. One term of the contract in suit, to which the plaintiff agreed by his father's acceptance of the policy, was the provision for notice to the defendants of any accident or injury for which a claim is to be made, with the further stipulation that "unless such notice be given within ten days after the accident, no claim shall be valid." The policy also provides that the failure to comply with the provisions of the section containing, among others, the stipulations as to the notice "shall debar recovery for such injuries." No notice of the plaintiff's accident and injury was given until one hundred and eighteen days after the accident. The provision as to notice required action by the plaintiff subsequent to the making of the policy and the occurrence of the loss, but compliance therewith is expressly made a condition precedent to the defendants' liability: Patrick v. Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197.

"In the case of a condition precedent, that is, an act to be performed by the plaintiff before the defendant's liability is to accrue under his contract, the plaintiff must aver in his declaration, and prove, either his performance of such condition precedent, or an offer to perform it which the defendant rejected; or his readiness to fulfill the condition until the defendant discharged him, the plaintiff, from so doing, or prevented the execution of the matter to be performed by him": Chitty on Contracts, *738; Chitty on Pleading, *309-313; Pendergast v. Meserve, 28 N. H. 109, 53 Am. Dec. 234; Woods v. Kirk, 28 N. H. 324, 61 Am. Dec. 614; Worsley v. Wood, 6 Durn. & E. 710. The case does not raise the question of what might constitute a substantial compliance with the condition, for there was no attempt to give notice within ten days of the accident, or within that period after the time when the plaintiff became aware of the serious character of his injury. The only excuse offered for noncompliance with the condition of the [262] policy is that the plaintiff's failure to do so was the result of accident, mistake and misfortune. But such fact is not a compliance with the condition, without which there can be no recovery at common law: Tasker v. Kenton Ins. Co., 58 N. H. 469; Heywood v. Maine Mut. Acc. Assn., 85 Me. 289, 27 Atl. 154; Kimball v. Masons etc. Assn., 90 Me. 183, 38 Atl. 102; Whalen v. Equitable Accident Co., 99 Me. 231, 58 Atl. 1057; Swain v. Security etc. Ins. Co., 165 Mass. 321, 43 N. E. 105; Wheeler v. Insurance Co., 82 N. Y. 543. The case is not understood to mean that the plaintiff's condition was such that it was impossible for him to have given the notice and fully complied with all the provisions of section 8 of the policy as soon as he learned of the character of his injury. The reason of his failure to do so appears to have been the fact that his agent did not inform him of the existence of the policy. Upon the facts, the case is controlled by the principle of the decision in Tasker v. Kenton Ins. Co., 59 N. H. 438. "In construing insurance policies courts are governed by the same general rules which are applicable to other written contracts. That is to say, it is the duty of the court to adopt that construction of the policy which, in its judgment, shall best correspond with the intention of the parties": Stone v. Granite Fire Ins. Co., 69 N. H. 438, 45 Atl. 235. The intention of the parties so found from competent evidence is the contract the court in each case is called upon to enforce.

"If there be a condition precedent to do an impossible thing, the obligation becomes single": Worsley v. Wood, 6 Durn. & E. 710. Whether the parties intended the giving of notice to be a condition precedent to recovery when the plaintiff was without knowledge of the injury or of the fact of the accident, or when for other reason compliance with the stipulations of the policy was impossible, or whether, as matter of law, such impossibility is in such case legal excuse for nonperformance, are questions not considered, because not presented. The authorities relied upon by the plaintiff may be decisive in such cases, but they have no application.

Exception overruled.

All concurred.

Although a Life Insurance Policy provides that the insurer must be given notice of the accident to, and proof of the death of, the insured within a specified time thereafter, or the policy will be forfeited, yet a beneficiary who is in ignorance of such death and of the existence of the policy complies with such conditions, if within a reasonable time after obtaining knowledge of these facts he gives the insurer notice and makes proof: Munz v. Standard Life etc. Ins. Co., 26 Utah, 69, 99 Am. St. Rep. 830, and see the cases cited in the cross-reference note thereto. Other decisions bearing on this question are Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 61 Am. St. Rep. 627; Paul v. Fidelity etc. Co., 186 Mass. 413, 104 Am. St. Rep. 594; Mead v. Phoenix Ins. Co., 68 Kan. 432, 104 Am. St. Rep. 412.

The Assignment of Life Insurance policies is the subject of an extended note to Chamberlain v. Butler, 87 Am. St. Rep. 484-519.

STEVENS v. MESERVE.

[73 N. H. 293, 61 Atl. 420.]

GUARDIAN AND WARD—Settlement of Estate.—The guardian of a minor heir may agree to a division and distribution of the ancestor's estate in kind without an order from the probate court, when it appears to him that such method will be for the best interests of his ward, and if such action is challenged, it is sufficient for him to show that he acted in good faith and with reasonable care and prudence. (p. 617.)

GUARDIAN AND WARD—Settlement of Ancestor's Estate.—A guardian of a minor heir is, upon a division of the ancestor's estate in kind, entitled to accept notes and securities other than those in which he would be required to invest funds coming into his hands, when the interest of his ward seems reasonably to so demand. (p. 618.)

GUARDIAN AND WARD—Evidence of Care Exercised by Guardian.—Evidence that stock and notes were taken by a guardian

as part of his ward's inheritance under the advice of counsel, that the original holder regarded them as safe, and that trustees, bank officials, and other investors were accustomed to invest in similar securities, is competent upon the question of the care, prudence and fidelity of such guardian. (p. 619.)

GUARDIAN AND WARD—Care Required of Guardian.—A guardian is required to exercise only reasonable diligence, care and prudence in looking after and managing the property of his ward. (p. 619.)

GUARDIAN AND WARD—Care Required of Guardian in Investing.—In making investments of his ward's estate in mortgage securities, a guardian is only required to satisfy himself by an investigation, conducted in good faith and with reasonable prudence, that the value of the mortgaged property is at least double the amount of the loan secured thereby. If he exercises such care he will be protected accordingly, even though he err in judgment. (p. 621.)

GUARDIAN AND WARD—Care Required of Guardian in Investing.—A guardian accepting mortgage notes in settlement of a desperate claim in favor of his ward with knowledge that the value of the security was less than double the value of the claim cannot be charged with a loss resulting from the transaction, if, after a full investigation, conducted in good faith and reasonable prudence, the guardian is satisfied that such settlement is for the best interests of his ward. (p. 622.)

L. P. Snow and A. S. Hayes, for the plaintiff.

J. Kivel, G. S. Frost and J. W. Remick, for the defendant.

296 CHASE, J. From an early date there have been statutory provisions in the province and state relating to the settlement and distribution of the estates of deceased persons. The earliest statutes followed in most respects the statute of 22 and 23 Charles II, enacted in 1670: See 1 N. H. Prov. Laws, Batch. ed., p. 566; Prov. Laws 1771, p. 104; Laws 1815, p. 207. They required the making of an inventory of the estate, the administration of it according to law, an accounting, and a distribution of the "surplusage" or residue among the widow and heirs in certain proportions. The first provision relating to the sum at which the administrator should account for the personal estate is that of section 10 of the act of February 3, 1789 (Laws 1815, p. 210), which provided that he should account for it "as the same shall be appraised," unless the judge ordered it sold. This provision, however, was materially changed by the provision of the act of February 15, 1791, "that no administrator shall be obliged to account with the judge of probate for the appraised value of any personal estate, if such administrator shall produce the personal estate so appraised": Laws 1815, p. 216, sec. 3. The administrator was required to pay the debts

and legacies in specie, if such he had "as assets in his hands"; and if not, he could pay them in the personal property on hand, or expose such property to the creditor or legatee to be levied upon: Prov. Laws 1771, c. 42, sec. 3; Laws 1815, p. 213, sec. 24. If the residue of the personal estate after the payment of the debts, etc., consisted of property other than money, and the administrator produced it, the division among the heirs must have been of the property in kind.

Such was the state of the law at the time of the revision of the probate laws in 1822: Laws 1820, c. 87; Laws 1822, cc. 27-34. Section 4, chapter 31 of the Laws of 1822 (Laws 1830, p. 333) provides that "the executor or administrator shall account in money [297] for the debts due the deceased by him received, or which by due diligence might have been collected and received. And he shall also be charged in money with the appraised value of the goods and chattels of the deceased," or, if they are sold under a license, with the proceeds of the sale: "Provided, nevertheless, that if there be any personal estate specifically bequeathed, or undisposed of at the request of the heirs or legatees, or preserved for their greater benefit, and not wanted for the payment of the just demands with which the estate is chargeable, the executor or administrator shall be discharged therefrom by producing the same and delivering it over to the heirs or legatees to whom it belongs." Upon the general revision of the laws in 1842, the foregoing provisions were re-enacted in sections 5, 6, and 7, chapter 159 of the Revised Statutes, without change excepting in form. The provision relating to the reservation of personal property from sale was put in a section by itself (section 6), and reads in part as follows: "Any property may be reserved at the sale, unless so needed [for the payment of debts], for the benefit or upon the request of the heirs or legatees, and the administrator shall be discharged by delivery thereof to the persons entitled thereto."

It will be noticed that the terms referring to property and heirs in these provisions are general. "Any personal estate" and "any property" are sufficiently broad to include choses in action as well as goods and chattels; and "heirs" includes minors as well as adults. No special provision is made for minor heirs. The protection of their interests is left to their guardians, whose duty it is to take care of their estates, real and personal, collect their dues, and protect their rights:

Rev. Stats., c. 150, secs. 3, 17. Accordingly, it has been held that a decree upon the settlement of the administrator's account relating to the ancestor's estate binds the minor heir whose guardian has notice of the proceeding and is present (Simmons v. Goodell, 63 N. H. 458, 2 Atl. 897); while such a decree has no effect upon the minor's rights if he has no guardian: Bean v. Bean, 33 N. H. 279. There can be no doubt that the guardian has authority to request a reservation of personal property for the benefit of his ward and to agree in his behalf upon a division of the property in kind. To hold otherwise would disable the guardian from performing the duties expressly imposed upon him by the statute. Furthermore, it would have a tendency to embarrass and delay the settlement of estates, and would oftentimes place the ward in a disadvantageous position and jeopardize his rights as a cestui que trust of the property. The proviso in the statute left the question whether the residue of the estate should be converted into money or be divided in kind open for amicable adjustment between the administrator and the heirs, if the latter so desired. [298] It should be noted in passing that heirs frequently settle the estates of their ancestors by agreement among themselves, without the intervention of administrators: Giles v. Churchill, 5 N. H. 337; Hibbard v. Kent, 15 N. H. 516; Clarke v. Clay, 31 N. H. 393; George v. Johnson, 145 N. H. 456. In Woodman v. Rowe, 59 N. H. 453, one of the heirs was a minor and was represented by a guardian. In French v. Currier, 47 N. H. 88, there was a division of stocks similar to that in this case.

Thus far the statutes made no provision for making a division and transfer of the property in kind, if either of the parties was unwilling. An act was passed in 1857, by which it was provided that "whenever there shall be bonds, stocks, or other written evidence of debt in the hands of an administrator of a solvent estate, and there are minor heirs, and it shall appear to the judge of probate for the county in which the administrator received his appointment that it would be for the interest of such minor heirs that such property should not be sold by the administrator, but be transferred to the heirs, the judge of probate may order such bonds, stocks or other written evidences of debt to be transferred to the heirs or the guardians of the heirs respectively, in their fair and just proportion; and the said guardians shall be authorized to receive and hold the same as long as

they may deem it safe and prudent so to do," and they shall be held accountable for the property as for real estate. Administrators and guardians were empowered to sell stock, bonds and securities payable at a distant day, upon license from the judge of probate; and in case of sale were accountable for the proceeds only. The act was not to be construed so as to authorize guardians to invest funds in their hands in a manner not theretofore authorized: Laws 1857, c. 1963. This last provision refers to the investment of money already in hand; it would be absurd to suppose that it was intended to prevent the exercise of freedom in the division of property under the prior sections.

The purpose of the act of 1857 evidently was to empower the judge of probate to order or decree a transfer of bonds, etc., to minor and other heirs whenever it appears to him to be for their interest, even if there be opposition. The act does not purport to take from the ward or his guardian any of the rights and powers which they possessed under the laws previously in force. Its provisions are not inconsistent with those laws. It was an addition to the earlier laws, rather than a modification of them: See Gardiner v. Thorndike, 183 Mass. 81, 66 N. E. 633. Administrators and heirs, including minors, were still, as previously, at liberty to arrange for a division of the residue of the personal property left after the payment of debts, etc., without first having it converted into money: [299] See Reed's Estate, 82 Pa. St. 428. When an order is made, the statute incidentally relieves the guardian from all responsibility for the taking of property in kind instead of in money. The order of the court is an adjudication that it is for the interest of the ward that the property should not be sold, but should be divided in specie. In such case the property goes to the ward like real estate, by inheritance; and the guardian's responsibility begins with its receipt, and in all respects resembles his responsibility relating to the ward's real estate. Unless there is an order, the guardian, upon accounting, must show that in agreeing to the division he acted in good faith and with reasonable prudence and discretion. But this does not make him an insurer that the arrangement shall in fact prove to be for the ward's interest. Although the guardian acts, not as an agent voluntarily appointed and controlled by the ward, but as an officer of the court whom the ward, by reason of tender years, is incapable of controlling, and therefore the guardian

should be strictly held to a faithful performance of the duties of the position, yet the law takes cognizance of the fact that he is only a human agency and is liable to err in judgment and in his forecast of the future. Consequently, the law holds him responsible in such transactions, as in all other authorized transactions, only for an observance of fidelity and such diligence, care and prudence as men of average intelligence observe in managing their own affairs: Woerner's Laws of Guardianship, sec. 60. Facts often present a different aspect, when viewed retrospectively, from that which they present when viewed prospectively; and a guardian who agrees in behalf of his ward to a division of property in kind assumes the risk of being prejudiced by this change of aspect. Therefore, as a general rule, it would be wise for him to obtain an order of the probate court and thereby avoid the responsibility of the transaction; but if, upon a careful consideration of the matter, he is satisfied that a division of the property in kind be for the interest of his ward, and he acts in good faith and with reasonable prudence, he may agree to it, and the law will uphold his act. If his action is challenged, the question will be whether he acted with good faith and with reasonable care and prudence. The nature of the property, the occasion for its division, and the manner of it, are facts to be considered in deciding the question.

Prior to 1866 there was no statute specifying the nature of the investments which guardians should make. By an act passed in that year, it was provided that they should invest in notes secured by mortgage of real estate at least double in value the notes, or in some incorporated savings bank in this state, or in the bonds of the United States, this state, or some town or county within the state, "and in no other way whatever; provided, however, that [300] it shall be lawful for such guardian to receive bonds, stocks or other written evidence of debt, wherever invested, from any administrator, and to hold them with the approval of the probate court, in the same way as now provided in chapter 1963 of the Pamphlet Laws of this state": Laws 1866, c. 4250, sec. 1. These provisions have been carried forward to the present time in sections 10 and 11, chapter 185 of the General Laws, and sections 8 and 9, chapter 178 of the Public Statutes, somewhat changed in form, but not in substance: See Commrs. Rep., Gen. Laws, c. 179, secs. 10, 11; Commrs. Rep., Pub. Stats., c. 177, secs. 8, 9. They pertain solely to the investment

of funds, and have no application whatever to the transfer of property from the ancestor's estate to a minor, to satisfy his right as an heir or legatee. By the express terms of the statute, it is lawful for the guardian to receive stocks, etc. from the administrator, as previously to the passage of the act.

It appears from these statutory provisions that the defendant, as guardian of the plaintiff, had authority to agree in his behalf with the administrator of Mr. Stevens' estate upon a division of the residue of the personal property of that estate between the widow and the plaintiff. In doing so he was not investing his ward's funds, but was acquiring his ward's inheritance. His authority was not limited or controlled in any way by the provisions of section 11, chapter 185 of the General Laws. If the interests of his ward required it, he was at liberty to accept notes which were secured otherwise than as prescribed by the statute, and other stocks than those specifically mentioned therein—even notes and stocks that for the time being might be regarded as of little or no value. The South Dakota notes afford an apt illustration of the wisdom of this provision. When they came into the hands of the administrator they were overdue and regarded as of doubtful value. The administrator failed to collect them, although the estate was in the course of administration by him for more than two years. When a portion of them were transferred to the defendant they were regarded as of little value. It is highly improbable that the administrator could have realized more than a nominal sum for them, upon a sale under license from the probate court. The defendant has collected five hundred and sixty-five dollars, and the plaintiff will realize whatever further can be obtained from them. The other notes (excepting three, amounting to sixteen hundred dollars) and the Gossard stock all represented investments made by Mr. Stevens, a man reputed to be a capable investor and financier. He had great confidence in them. It does not appear that the notes had become due. They were all believed to be good. The defendant was satisfied that they were secured by mortgages of real estate double in value the sums represented by them. The Gossard Investment [301] Company was engaged in the business of negotiating loans on farm, village and city properties in the West—a business not specially hazardous if properly conducted. The stock was a good paying security,

and was salable in the market at par. There is nothing tending to show that the loans or stock were of a speculative nature. The defendant did not need the money for the plaintiff's support. If these investments had been converted into money by the administrator, and the money had been paid to the defendant, it would have been his duty to reinvest it. The change would necessarily be attended with expense and loss of income, together amounting to a considerable sum. The defendant was advised by able counsel that he was authorized to receive these securities from the administrator as a part of his ward's inheritance. He acted in good faith, believing the course taken to be in all respects a prudent and safe one, and for the interest of his ward. While the fact that Mr. Stevens originally made these investments and had great confidence in them, and the fact that bank officials, trustees and other investors were in the habit of investing in similar securities, and the advice of counsel that the defendant was authorized to take the securities from the administrator, may not be competent evidence upon the question of the defendant's authority in the premises, they were competent and weighty evidence upon the question of his good faith, care and prudence: Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; Nagle v. Robins, 9 Wyo. 211, 62 Pac. 154, 796. Although the defendant receipted for the property in gross as if it were money, all parties connected with the transaction understood its real nature, and treated it as a transfer of the property instead of a payment of money. The defendant had no other interest whatever in it than to promote the welfare of his ward. Under these circumstances, the real nature of the transaction cannot be changed, or the rights of the defendant be affected, by mere matter of form. As the defendant was authorized by the law to agree, in behalf of his ward, to a division of the personal estate in kind and to a settlement of the administrator's account accordingly, and as it appears that in making the division he acted in good faith and with reasonable care and prudence, the plaintiff is bound by the division, and the defendant is not liable for losses that are attributable to it. Of course, it was the defendant's duty to exercise reasonable diligence and care in looking after and managing the property after he received it; and it appears that he fully performed this duty.

Among the notes thus accepted by the defendant there were three, together amounting to sixteen hundred dollars

which the administrator had lent money upon during the administration of the estate: See Judge of Probate v. Mathes, 60 N. H. 433. It does not appear [302] whether the defendant knew or ought to have known of this fact when the administrator's account was settled. If the law would not justify the acts of the administrator in making these loans, the proper time to raise the question was at the time of the division of the property and the settlement of the administration account. As has been seen, the defendant properly represented the plaintiff in those matters, and the plaintiff is bound thereby. Furthermore, the notes appeared to be such as the guardian might lawfully invest in; and if they are viewed in this light, it will be seen hereinafter that the guardian, in accepting them, acted within the authority conferred upon him by the statute.

The plaintiff seeks further to charge the defendant with the money invested by him as guardian in notes secured by mortgages of real estate in the West, on the ground that the real estate was not double the notes in value. The defendant in every instance, excepting certain notes hereinafter considered by themselves, examined the application for the loan, considered the evidence relating to the value of the real estate mortgaged to secure it, and "honestly believed" that the value was double the note. The affiants as to values appeared to be acquainted with such property, and their certificates were accepted by the defendant without further inquiries concerning them, and given full faith and credit. The method thus adopted was the only practicable method available, and was that adopted by bank officials, trustees and other investors in such securities. In arriving at his belief, the defendant acted as a prudent, careful and reasonable man, considering the nature and importance of the business. The real estate mortgaged to secure the notes that were overdue and unpaid January 21, 1901—the date to which the defendant's final account related—was not double the notes in value, but he was not in fault for not knowing the fact. How much they fell short does not appear. The question is whether, in view of these findings of fact by the superior court, the investments were authorized by the successors of the statute of 1866, already mentioned. The present form of this statute, omitting the parts relating to the exception before mentioned, is as follows: "Every guardian of a minor shall invest in the name of his ward, or in his own name as

guardian, the money and the proceeds of all real and personal property of his ward in notes secured by mortgage of real estate at least double in value of the notes, in some incorporated savings bank in this state, or in the bonds or loans of this state, of some town, city or county of this state, or of the United States, and in no other way": Pub. Stats., c. 178, sec. 9. The plaintiff takes the position that an investment in a note secured by a mortgage of real estate is unauthorized by the statute, unless it [303] appears, when the question arises in a judicial proceeding, that the real estate was of the required value, however careful, intelligent and honest the guardian may be in determining that it was so when he made the loan. The position, in short, is that unless the guardian is infallible, he is liable to have his act in making such an investment pronounced unauthorized, and this upon a finding of facts by men equally fallible with himself. Was such the intention expressed by the legislature in the statute?

The statute makes no provision for judicially determining in the first instance the value of the real estate offered for mortgage. Such value is not ordinarily a fact, certain and readily ascertainable. It depends upon a great variety of circumstances. Persons well qualified to judge oftentimes differ widely regarding it. Generally, a person who proposes to loan money upon a note secured by a mortgage of real estate must determine for himself the value of the property offered for mortgage. It is reasonable to suppose that the legislature had these facts in mind. It is to be presumed that they contemplated a plan that would be practical. In view of these considerations, it is manifest that the intention was that the guardian—the same as lenders of money generally—should satisfy himself as to the value before making the loan. The statute requires him to be convinced that the value is double the note. In forming this judgment, he must act as in all other matters intrusted to his discretion—in good faith and with reasonable care, diligence and prudence, such as men of average prudence exercise under like circumstances. If upon an investigation of that kind he becomes satisfied that the real estate is of the required value, the statute authorizes him to make the loan, and will protect him accordingly. But if he voluntarily makes a loan, knowing that the real estate mortgaged to secure it is of less value than double the note, or if, by reason of his want of good faith

or of due care, diligence and prudence, the real estate does not meet the statutory requirement, the loan will be outside the authority of the law, and he will be responsible to his ward for the money loaned.

When Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333, was decided, the rule as to investments by trustees was very general in character, requiring merely that they should invest in "good and safe securities," without specifying the securities so regarded further than that loans of money upon notes must generally be secured by mortgage, or sureties, or in some other way: See Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Judge of Probate v. Mathes, 60 N. H. 433. In Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333, Wood, C. J., after referring to this fact, says: "If he [trustee] lends the money, he ought to be prepared to show that the borrower was, at the time, possessed of [304] property and in good credit, and that he has taken security in the names of persons of like standing, or, what is less open to question, in property of value, according to the usual tests of value. We mean that the trustee should show that he has endeavored to keep within these rules, so that the loss, if any, has been in spite of these endeavors and by reason of causes which have baffled them, whether by misleading his honest judgment as to the actual character of the property or of the individuals at the time, or by effecting an actual change and prostration of them since." These observations apply with the same force to the situation as changed by the statute, so far as real estate mortgages are concerned: Bell v. Sawyer, 59 N. H. 393. Upon considering the findings of the superior court, it cannot be held that the guardian's investments in the mortgage loans under consideration were not authorized by the statute.

The guardian took certain notes secured by mortgages of real estate less in value than double the notes, in settlement of claims that he had against his agent for the agent's defaults. He knew that the real estate mortgaged was not of the required value. He made every reasonable effort to collect the claims, but failing to do so, finally accepted the notes as the only satisfaction of the claims he could obtain. The loans were in a sense involuntary. The origin of the claims, or his failure to collect them, was not due to any want of faithfulness, diligence, care or prudence on his part. It would be a novel and unreasonable rule of law that would not allow a guardian to save for his ward all that could be

saved under such circumstances. On the contrary, the law imposed the duty upon the guardian to use reasonable care and diligence to that end; and it appears that he fulfilled the duty in this instance. The transactions were not investments of money under the statute, but the settlement of desperate claims outstanding in favor of the ward. His authority in the premises was derived from section 6, chapter 178 of the Public Statutes—not from section 9 of that chapter. The findings of the superior court fully justify his acts with reference to these claims: Dodge v. Stickney, 62 N. H. 330.

The order of the superior court affirming the decree of the judge of probate should stand.

Case discharged.

Young, J., did not sit; the others concurred.

The Common-law Powers of Guardians are discussed at length in the monographic note to Schmidt v. Shaver, 89 Am. St. Rep. 257. At pages 292-297 of this note will be found a discussion of the authority of guardians to make investments and their duty in regard to taking proper security.

BROOKHOUSE v. UNION PUBLISHING COMPANY.

[73 N. H. 368, 62 Atl. 219.]

TRUSTS—Misapplication of Fund—Evidence of Intent.—If a trustee makes use of the money of his cestui que trust for his own purpose very soon after withdrawing it from a savings bank, and in making use of it pursues his usual habit in the use of private funds, depositing the money in the bank account of a corporation of which he is treasurer, and immediately checking it out for his own private purposes, this is competent evidence upon the question of his intention at the time of withdrawing the money from the savings bank. (p. 624.)

TRUSTS—Constructive.—If trust funds are deposited in the bank account of a corporation by the treasurer thereof and used very soon thereafter by him for his private purposes, the corporation is not liable to the beneficial owner for a misappropriation by reason of such mere temporary possession of the fund from which no benefit was derived. (p. 625.)

TRUSTS—Misappropriation—Liability of Depositary—Notice of Trust.—The mingling of guardianship funds with private funds in a deposit account with a bank, kept in the guardian's individual name, is not, in itself, unlawful. In such case the form of the paper will not impose upon the bank the duty of seeing to it that the guardianship portion of the account is properly used. The ordinary presumption applies that the guardian is acting in good faith and will make proper use of the money in drawing checks against the deposit, and to charge the bank with liability for a misapplication

of the funds it must appear that it had knowledge of the intended misapplication, or of facts which would put it on inquiry. (p. 627.)

TRUSTS—Misapplication of Funds.—Banks are not Charged with the duty of supervising the administration of trusts, where in the due course of business they receive checks and drafts payable to, and properly indorsed by, trustees in their trust capacity. (p. 627.)

TRUSTS—Misappropriation of Fund—Depositary—Notice of Trust.—If a treasurer of a corporation, who usually utilizes the corporation bank account for his own private business, causes to be deposited therein negotiable paper payable to and indorsed by himself, as guardian, and very soon thereafter misappropriates the money in furtherance of a preconceived scheme, the corporation is not liable for the misappropriation of the trust fund on the ground that it received it with notice of the trust and aided in the wrongful act. (p. 628.)

PRINCIPAL AND AGENT—Knowledge of Agent—Fraud.—The principal is not charged with the knowledge of his agent when the latter is engaged in committing an independent, fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. (p. 628.)

CORPORATIONS—Notice to Officer.—The rule that notice to the treasurer of a corporation is notice to the corporation does not apply to the misappropriation by such treasurer of trust funds on deposit with the corporation, when the facts to be imputed relate to an independent fraudulent act of such treasurer. (p. 630.)

Taggart, Tuttle, Burroughs & Wyman, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

370 CHASE, J. The fact that Moore made use of the money in question for his own purposes very soon after he withdrew it from the savings bank, and that in using it he pursued the course of his habit in the use of private funds—depositing the money in the National Bank in the defendants' name and immediately checking it out for his private purposes—was competent evidence upon the question of his intention at the time of the withdrawals. As this evidence has a tendency to support the court's finding, the plaintiff's exception to the finding must be overruled; and the finding must be accepted as true in considering the questions of law raised by the case.

The plaintiff is entitled to the relief sought (1) if the defendants now have possession of the money in question; or (2) if they 371 received it from Moore with notice of the trust and applied it to the payment of Moore's individual indebtedness to them; or (3) if they so received it and aided Moore in wrongfully diverting it from the plaintiff: Hill v. McIntire, 39 N. H. 410, 75 Am. Dec. 229; Sherburne v. Goodwin, 44 N. H. 271; French v. Currier, 47 N. H. 88; Hardy v. Citizens' Bank, 61 N. H. 34.

The first (1) ground of relief certainly does not exist. The fund was traced, not into the defendants' possession merely, but through their possession into the possession of other parties: Bank Commrs. v. Security Trust Co., 70 N. H. 536, 49 Atl. 113.

Nor is the second (2) ground of relief established. The money was not paid and received on account of Moore's indebtedness to the defendants, but in the use by Moore of the defendants' deposit account with the Manchester National Bank as a "conduit" for, or means of, transmitting money in his private enterprises. If the defendants had any use whatever of the money, which is doubtful, it was only as an incident of the deposit, during the brief time while the money was passing through their deposit account with the National Bank, and with no intention on the part of Moore, or on their part, so far as appears, to permanently convert the money to their uses. There was no such conversion of the money as will justify a court of equity in holding the defendants responsible for it as trustees for the plaintiff.

The question remains (3) whether the defendants received the money with notice of the trust, and aided Moore in wrongfully diverting it from the plaintiff. In considering this question, the matter of notice is of vital importance. The defendants took no part whatever in withdrawing the money from the savings bank. That was solely Moore's act; and being accompanied with the intention of using the money for his own purposes, constituted a complete conversion of it. He had already converted the money to his own uses when he handed the certificates of deposit and the Boston draft, duly indorsed by him as guardian, to the defendants' assistant treasurer, with directions to deposit the same in the defendants' bank account. To consummate his fraudulent scheme, he deemed it convenient or advisable to use that account as a "conduit" through which to pass the money from himself to the parties to whom he might pay it. The only persons who took part in operating, so to speak, the "conduit" were Moore himself and the defendants' assistant treasurer. No other officer or servant of the defendants did anything whatever in respect to the deposit or withdrawal of the money. The entries upon the defendants' books relating to the money were in Moore's name. An officer or agent of the defendants, however attentive to his duties, would not learn from an examination of the books that the plaintiff's

372 money was passing through their bank account, nor discover facts that would put him upon inquiry in that direction. The defendants' assistant treasurer received no direct information as to Moore's fraudulent intention. His only knowledge relating to the transactions was that the certificates of deposit and draft were payable to Moore as guardian or order, were indorsed by him in that capacity, and were deposited with the defendants as if they were his private funds. In considering these facts it must be borne in mind that the certificates and draft, unlike certificates of stock in corporations or promissory notes, were mere temporary representatives of value or credits. They did not bear interest. They were negotiable paper according to the commercial law: 2 Daniel on Negotiable Instruments, secs. 1652, 1703, 1705. In the ordinary course of business, such paper is used like currency to pass money from one person to another in business transactions—not to represent money more or less permanently invested with a view of producing income. Decisions relating to the transfer by trustees of stock certificates, promissory notes, and similar papers afford little aid in a case of this kind. Circumstances that would conclusively show that a transfer of certificates of stock, etc., was in violation of the trust might be entirely consistent with a lawful transfer of certificates of deposit and drafts. To a person not informed of the circumstances by which Moore obtained these papers and of his intention in respect to their use, it would appear that he had a right to negotiate them as he did in this case. Indeed, if they did not lawfully belong to him individually in consequence of his past transactions in executing the trust, it would be his duty to make use of them in paying outstanding claims against the trust estate, if any, or in making investments, or in some other way for the benefit of his ward. To hold them an unreasonable length of time would be a breach of trust, and would subject him to liability for any loss arising therefrom. By reason of his position as guardian and the form of the papers, he had absolute control of the manner in which they should be used. No license from the probate court or other source was necessary. He could transfer them directly to the persons to whom he intended ultimately to pay the money represented by them, or he could convert them into currency and use that, or he could deposit them in a bank in his name as guardian, or in his own name without further description, and

draw checks against the deposit. If he transferred them directly to a person in payment of his private indebtedness, or for some other consideration known to be for his private benefit, the form of the paper alone would be sufficient to put the person upon inquiry as to his right to so use the paper, and to charge him with knowledge of the facts he would thus learn. Such use is generally wholly [373] inconsistent with the guardian's rights, and is not made in the ordinary course of business. But the indorsee of such papers who receives them in the course of changing them into currency, or in the course of distributing the credits they represent by means of a temporary deposit and checks or orders drawn against the deposit, is not put upon inquiry by the mere form of the paper; for such use is consistent with the guardian's rights and duty. To charge such indorsee with responsibility for a misapplication of the funds, it must appear that he had knowledge of the contemplated misapplication, or of facts that would put him upon inquiry. Even a mingling of guardianship funds with private funds in a deposit account with a bank kept in the guardian's individual name is not, in itself, unlawful, though it be unwise. In such case the form of the paper will not impose upon the bank the duty of seeing to it that the guardianship portion of the account is properly used. The ordinary presumption applies—that the guardian is acting in good faith, and will make a proper use of the money in drawing checks against the deposit: See Sherburne v. Goodwin, 44 N. H. 271. The only obligation of the bank is to honor the checks that are duly drawn against the account in the form it is kept. To charge banks with the duty of supervising the administration of trusts, when in the due course of business they receive checks and drafts payable to and properly indorsed by trustees in their trust capacity, would place an unreasonable burden upon the banks and seriously interfere with commercial transactions. The law imposes no such duty upon banks: Bank Commrs. v. Security Trust Co., 70 N. H. 536, 49 Atl. 113; Goodwin v. American Nat. Bank, 48 Conn. 550; Board of Freeholders v. Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185; State Nat. Bank v. Reilly, 124 Ill. 464, 14 N. E. 657; Coleman v. First Nat. Bank, 94 Tex. 605, 86 Am. St. Rep. 871, 63 S. W. 867; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 104 Am. St. Rep. 885, 80 S. W. 604, 65 L. R. A. 820; National Bank v. Insurance Co., 104 U. S. 54, 26 L. ed. 693; Gray v. Johnston, L. R.

3 Eng. & Ir. App. Cas. 1; 2 Daniel on Negotiable Instruments, sec. 1612. It is true that the defendants are not bankers, but their obligation to Moore in respect to funds which he placed in their bank account, or in their possession to be there deposited, was like that of a bank to its depositor. It is not questioned that he had the defendants' license to use the account. If the authority was not expressly given, it must have arisen from the practice which had existed for years, presumably with the defendants' knowledge and acquiescence. This authority, together with Moore's official relation to the defendants, enabled him to make use of the account for his private purposes as fully and conveniently as he could have done if the account in the bank had been in his own name. He could make deposits and check them out at will by his own act. He could use the account for a lawful transmission of guardianship [374] funds, the same as he could if the deposit had been made in the bank in his own name. When the defendants' assistant treasurer received, indorsed and deposited the certificates and draft, he might properly presume that Moore would withdraw the funds so deposited for lawful purposes. It does not appear that the assistant treasurer had knowledge of any facts that had a tendency to overcome this presumption. If he was acting within his authority as assistant treasurer, which—Moore being present and acting—is doubtful, the defendants are not chargeable through him with knowledge of Moore's contemplated misappropriation of the funds, or of facts that would put them upon inquiry in regard to the matter.

The plaintiff further says that the defendants had notice of the fraud through Moore himself, their treasurer and general manager. It is true that a principal is ordinarily chargeable with the knowledge acquired by his agent in executing the agency, and is subject to the liabilities which such knowledge imposes. But there is a well-established exception to this rule, by which the principal is not charged with the knowledge of his agent when the latter is engaged in "committing an independent, fraudulent act on his own account, and the facts to be imputed relate to the fraudulent act": Allen v. South Boston R. R., 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917, 5 L. R. A. 716; Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912; Produce etc. Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; Camden etc. Co. v. Lord, 67 N. J. Eq. 489, 58 Atl. 607; Gunster v. Scranton etc. Co.,

181 Pa. St. 327, 59 Am. St. Rep. 650, 37 Atl. 550; Frenkel v. Hudson, 82 Ala. 158; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42 L. ed. 987; 2 Pomeroy's Equity Jurisprudence, 3d ed., sec. 675, and authorities cited in notes; 1 Am. & Eng. Ency. of Law, 2d ed., 1145, and authorities cited in notes. This exception was recognized in this state in Clark v. Marshall, 62 N. H. 498. Mr. Pomeroy suggests a doubt whether it applies to the managing officers of a corporation "through whom alone the corporation can act": 2 Pomeroy's Equity Jurisprudence, 3d ed., sec. 675, note 1. He gives no reason for the doubt, and the cases which seem to have raised it—Holden v. New York etc. Bank, 72 N. Y. 286, and First Nat. Bank v. Town of New Milford, 36 Conn. 93—were decided upon an application of the general rule to the facts, without any allusion to the exception, and of course without any allusion to a distinction in the application of the exception when the principal is a corporation instead of a natural person. In both cases the principals were seeking to hold an advantage acquired through the fraudulent acts of their agents, and were chargeable with the fraud by virtue of the familiar principle, that a person cannot ratify acts and disaffirm the fraud that is a constituent part of them. In the case at bar, the defendants do not set up any claim to the funds in dispute. The funds have passed beyond their [375] reach without being of any advantage to them. In many of the cases cited, the principals were corporations which acted solely through the officers who committed the fraud. Whatever be the true reason for the exception—whether it be the presumption that the agent would not communicate knowledge of his fraud to his principal, or the consideration that the fraudulent acts are not within the scope of the agent's employment and are wholly for his benefit—it is not perceived how the fact that the principal is a corporation instead of a natural person affects the application and force of the reason. The knowledge of a corporation, whether actual or imputed, must necessarily be that of its officers; but this circumstance does not transform the officers into principals. The stockholders of a corporation like that of the defendants furnish the capital and presumably carry on its business. The principalship of the corporation is embodied in them. The officers and agents of the corporations exercise only delegated authority—delegated by virtue of their election to office under the law of the state, or by virtue of a by-law or rule of the corpora-

tion, or by virtue of its habitual manner of doing business. If, as the plaintiff argues, the assistant treasurer represented the defendants in the receipts of the deposits, Moore was not the only officer of the corporation through whom the corporation could act relating to the matter. The facts would not admit of the application of the rule to which Mr. Pomeroy's doubt relates.

The application of the rule embodied in the exception to the peculiar circumstances of this case produces a just result—one that commands the approval of a court of equity. The defendants were not really the principals of Moore in respect to the deposits and withdrawals of the plaintiff's money in and from their bank account; they were his agents. The transactions were solely on his account and for his benefit. The defendants received no substantial benefit from them. The only authority conferred upon Moore by them which he used was the authority to use their bank account for his private purposes. In drawing checks, he fulfilled their obligation to himself. He was really acting for himself. If he had drawn the checks in the course of a legal use of the funds, the plaintiff would have had no cause for complaint. As as been seen, the defendants did not owe the plaintiff the duty of looking after the appropriation of her money, even if they knew it was temporarily in their possession. The presumption was that he would lawfully appropriate it. There is no evidence outside of that relating to Moore's acts and intention in these particular transactions which tends to show that they had reason to anticipate he would attempt to use the authority they conferred upon him in misappropriating trust funds. They were, at most, [376] only unwitting agents of Moore in the transactions. The mere fact that he acted for the defendants in fulfilling their obligation to him does not in justice and equity afford a sufficient reason for charging them with knowledge and making them responsible equally with himself for a fraud that he was committing outside the scope of the authority he exercised in their behalf.

Still another position taken by the plaintiff is that she might maintain an action against the Manchester National Bank, on the ground that the form of the certificates of deposit and draft was notice to the bank that the papers represented guardianship funds, to which the defendants could not give a valid title; that if the plaintiff pursued that course, the bank would have a right of action against the defendants

upon their indorsements of the paper; and that equity will enable the plaintiff to proceed directly against the defendants in the interest of the bank as well as herself, thereby avoiding the necessity of two actions. It follows from what has already been said that this position is not tenable, even if equity would have jurisdiction of the subject matter in case the bank acquired no valid title to the paper—a point that has not been considered.

The plaintiff is not entitled to the relief sought, and the bill should be dismissed.

Exception overruled; case discharged.

Bingham, J., did not sit; the others concurred.

The Mere Fact that a Bank knows that moneys deposited with it by a depositor have been acquired in a fiduciary capacity does not impose on it the duty, or give it the right, to institute an inquiry into the conduct of its customer in order to protect those for whom he may hold the fund: Interstate Nat. Bank v. Claxton, 97 Tex. 569, 104 Am. St. Rep. 885; Coleman v. First Nat. Bank, 94 Tex. 605, 86 Am. St. Rep. 871. A bank has a right to assume that money deposited by a trustee will be properly applied under the trust. It may, therefore, lawfully pay checks signed by him, whether signed in his representative character or not: American Trust etc. Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167; Duckett v. Mechanics' Nat. Bank, 86 Md. 400, 63 Am. St. Rep. 513.

Notice to an Agent is not deemed notice to his principal when the communication of the fact would necessarily prevent the consummation of a fraudulent scheme in which the agent is engaged against the principal: Gunster v. Scranton Illuminating etc. Co., 181 Pa. St. 327, 59 Am. St. Rep. 650; note to Trentor v. Pothen, 24 Am. St. Rep. 232. If a clerk defrauds his employer by forging the latter's indorsement, the knowledge of the clerk in respect to the perpetration of the fraud is not imputable to the employer: Shepard etc. Lumber Co. v. Eldridge, 171 Mass. 516, 68 Am. St. Rep. 446.

MERRILL v. AMERICAN BAPTIST MISSIONARY UNION.

[73 N. H. 414, 62 Atl. 647.]

WILLS—Devises—Perpetuities.—A will bequeathing to the testator's children and their heirs forever the use of certain real estate, and providing that if such heirs should cease to exist the property shall go to certain devisees, is void for remoteness, and as an attempt to create a conditional fee, or an estate in fee tail, and the children mentioned take an absolute fee. (p. 634.)

WILLS—Trusts—Construction.—If a will bequeathes certain real estate to the testator's children and their heirs forever, providing they shall keep the property insured and pay all taxes and claims, and pay annually a certain sum to a specified corporation, and also providing that if at any time all such heirs shall cease to exist, the property shall go to the corporation named, the attempt to create a conditional fee is void and the children take an absolute fee impressed with a trust to pay the annuity specified from the income. (p. 634.)

ANNUITIES May be Perpetual, or for life or for a period of years, and if unlimited as to time, generally continue during the life of the annuitant. (p. 636.)

ANNUITIES—Perpetuities.—A perpetual annuity given by will to a charitable corporation is valid. (p. 636.)

CHARITABLE TRUSTS are not within the rule against perpetuities. (p. 636.)

E. L. Kittredge, for the plaintiffs.

G. B. French, for the defendants.

415 CHASE, J. The terms of the devise are: "I give, bequeath, and devise to my four children [naming them] the use, income and occupancy of my coal-yard property [describing it], to them and their heirs forever, by" their doing the acts specified. The right to exercise and enjoy the use, income and occupancy of material things constitutes ownership; and a conveyance of these powers over particular things is ordinarily a conveyance of the things themselves. "A devise of the income of lands is, in effect, a devise of the lands": Reed v. Reed, 9 Mass. 372. See, also, Sampson v. Randall, 72 Me. 109; Hopkins v. Keazer, 89 Me. 347, 355; Diament v. Lore, 31 N. J. L. 220. It is evident that "use, income and occupancy" were used by the testator in this sense, and that he intended thereby to devise the ownership of his coal-yard property, or, expressing the idea in still briefer terms, to devise the property itself.

The devise is to the four children, "to them and their heirs forever." These are apt words to devise the property in fee. But there are other provisions in the will which seem to qualify the meaning of these words. Passing by, for the moment, the provisions relating to the care of the property, and the disposition of its income, this provision is reached: "Should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant to occupy and care for said property as above directed, I would then give, bequeath and devise the same," etc. This provision conveys the idea that the property should continue in the lineal descendants of the testator so long as there are any. [416] Reading the first provision above considered and this provision together, it seems that the testator's intention was to give his four children a conditional fee in the property, or an estate in fee tail, instead of an absolute fee. But such intention conflicts with public policy relating to restrictions upon the alienation of real property. Prior to the passage of the statute de donis conditional estates of this kind were not considered with favor by the courts, because they tied up property indefinitely. The courts adopted what Blackstone characterizes "subtle finesse of construction, ... in order to shorten the duration of these conditional estates," and held, among other things, that the birth of issue to the first taker fulfilled the condition and converted the estate into an absolute fee. To prevent the courts from thus controlling the law, the statute of Westminster II, commonly called the statute de donis, was passed. It "revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting that from thenceforth the will of the donor be observed," thus paying "a greater regard to the private will and intentions of the donor than to the propriety of such intentions, or any public considerations whatsoever": 2 Blackstone's Commentaries, 110, 111, 112. At first it seems to have been understood that the statute de donis was in force in this state, and that estates tail might be created; but in 1857 it was held that the statute had been impliedly repealed by the state statutes relating to the descent and devise of property, and consequently that such estates no longer exist here: Jewell v. Warner, 35 N. H. 176; Crockett v. Robinson, 46 N. H. 454. A statute was passed in 1837 enabling a tenant in fee tail to convey the land by deed and thereby bar all remainders and reversions expectant on the estate tail: Laws

1837, c. 340, sec. 1. This provision was continued in the Revised Statutes (chapter 129, section 1), but was dropped upon the enactment of the General Statutes in 1867, no doubt because of the intervening decisions above cited. The policy of the state, now well established, is that real estate shall not be tied up indefinitely by entailment. Attempts to do so in a case like this result in the transmission of an estate in fee, instead of in tail: Crockett v. Robinson, 46 N. H. 454. A primary object of the testator in this case appears to have been to insure the payment to the three societies named, of the annuities given to them. As will be seen later on, this object is not defeated, nor is its fulfillment imperiled, by following the policy of the state in the interpretation of this devise. It follows, also, from what has been said that there was no remainder or reversion for the devise over to the societies to operate upon, in case of the failure of the testator's issue. Further than this, it is plain that the failure of issue referred to was not a failure at the death of [417] the first taker, but a failure at some indefinite time in the future. The language is, "should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant," etc. This language removes all doubt on this point. The devise over to the societies, being limited upon an indefinite failure of issue, conflicts with the public policy above mentioned, and is void for remoteness: Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Hall v. Chaffee, 14 N. H. 215; Pinkham v. Blair, 57 N. H. 226; Edgerly v. Barker, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328. The estate which the four children got by the devise "to them and their heirs forever" was an estate in fee, notwithstanding the subsequent provision in the will above considered.

But the four children, and all others who succeed them in title to the property, are charged by implication with a trust in respect to it, to a certain extent: New Parish in Exeter v. Odiorne, 1 N. H. 232; Hutchins v. Heywood, 50 N. H. 491; Tappan's Appeal, 55 N. H. 317. The devise "to them and their heirs forever" is "by their keeping the buildings insured and in good repair, paying all taxes and claims against said property, including any deficiency arising in the settlement of my estate, making such improvements from time to time as the business seems to warrant and require and paying" the annuities to the societies named, and the balance of the net annual income from the property to the wife annu-

ally during life. By the death of the widow she has ceased to be a beneficiary under the trust. No suggestion has been made that there are any claims outstanding against the property or the testator's estate. Apparently, the only beneficiaries of the trust now left are the three societies. They and the plaintiffs are the only parties interested in the property. It clearly appears that the testator's intention was that the annuities should be paid from the income of the property—not from the property itself. This appears from the fact that, after making provision for the payment of the taxes, insurance and other incidental charges against the property and the annuities to the three societies, the testator provides that "the balance of the net annual income" shall be paid to his wife annually during life. The provision for the payment of taxes and other incidental charges appears to have been made for the purpose of preserving the body of the property to produce income to meet the payments to the annuitants and the widow. The presence of this idea in his mind is also shown by the devise over of the property, should the time ever come when there is no lineal descendant to occupy and care for the property as directed. The annuities are charged upon the income and not upon the corpus of the property: Nudd v. Powers, 136 Mass. 273; Delaney v. Van Aulen, 84 N. Y. 16; [418] Irwin v. Woolpert, 128 Ill. 527, 21 N. E. 501; De Haven v. Sherman, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745; Baker v. Baker, 6 H. L. Cas. 616. The duty is placed upon the plaintiffs and their successors in the legal title to the property to pay the taxes and other incidental charges upon it for the time being, and to pay for its net income the annuities, whether the income be derived from tenants or from use of the property by themselves. So long as they faithfully perform this duty, the primary object of the testator is fulfilled. The personal interests of those in whom the legal title to the property is lodged for the time being—they being entitled to the income of the property, except the sum required to pay the annuities—operate as a guaranty that the taxes and other incidental charges will be seasonably paid and that the property will be properly improved. But should they fail to perform the duty in any particular, and the interests of the societies are affected or prejudiced thereby, the court of equity, in the exercise of its powers relating to trusts, will afford the beneficiaries an adequate remedy.

It does not appear, other than from the very general description of the property given in the case, what its income-producing capacity is. As described, the property is quite extensive in quantity, and appears to be favorably located for business purposes and to have acquired a particular business character by prior use. It would seem probable that its net income will be sufficient at all times to pay the annuities and something to the general owners. It is unnecessary to consider at this time what would be the effect upon the annuitants in case the net income should be insufficient at any time to pay them in full—a question that may never arise.

An annuity may be perpetual, or for life, or for a period of years. A gift of an annuity to a person without a limitation or qualification as to duration would generally be understood as designed to continue during the life of the annuitant: 2 Story's Equity Jurisprudence, sec. 1065a, and notes; Bates v. Barry, 125 Mass. 83, 28 Am. Rep. 207; Yates v. Maddan, 3 Macn. & G. 532; Blight v. Hartnoll, 19 Ch. D. 294. Here the annuitants are corporations, and all the evidence tends to show that the intention was that each annuity should continue so long as the corporation to which it is given exists and fulfills the purposes designated by the corporation's charter. That it may continue perpetually does not affect its validity. Charitable trusts are not within the rule against perpetuities: Rolfe and Rumford Asylum v. Lefebre, 69 N. H. 238, 45 Atl. 1087.

Case discharged.

All concurred.

The Rule Against Perpetuities is the subject of an extended note to In re Walkerly, 49 Am. St. Rep. 117-138. The rule against perpetuities is generally not applicable to gifts for charitable uses: Codman v. Brigham, 187 Mass. 309, 105 Am. St. Rep. 394, and cases cited in the cross-reference note thereto. According to Missionary Society v. Humphreys, 91 Md. 131, 80 Am. St. Rep. 432, however, the rule against perpetuities applies to charitable trusts as well as to any other.

As to What are Charitable Uses or Trusts, see the monographic note to Hoeffer v. Clogan, 63 Am. St. Rep. 248-267.

WESTMINSTER NATIONAL BANK v. NEW ENGLAND ELECTRICAL WORKS.

[73 N. H. 465, 62 Atl. 971.]

CORPORATIONS—Transfers of Stock.—The ownership of stock in a corporation passes from the seller to the buyer by force of the contract of sale, and not by operation of law, as soon as such contract is fully consummated, but as between the buyer and the corporation, or interested third parties without notice, the buyer does not ordinarily acquire all the rights of a stockholder until the transfer is entered on the corporate records. (p. 638.)

CORPORATIONS—Transfer of Title to Stock—Estoppel to Deny.—If a certificate of stock, regular in form and properly executed, recites that the person to whom it is issued is the owner of certain shares of fully paid-up and nonassessable stock in a corporation, it is estopped to deny the validity of the stock as against a purchaser from such person in good faith and for value, and cannot refuse to recognize such purchaser as a stockholder, or to record and transfer the stock on its books on the ground that the certificate was illegally acquired by such vendor, who paid nothing for the stock. (p. 639.)

CORPORATIONS—Transfers of Paid-up Stock.—If certificates of stock in a corporation state upon their face that the shares have been fully paid-up, the corporation will be estopped from denying the truth of this representation, and cannot charge the purchaser and transferee with further liability, although the shares have never in fact been paid up. (p. 639.)

BANKS AND BANKING—Power of National Bank to Acquire Stock.—A national bank, which in the ordinary course of business, receives corporate stock as collateral security for a loan, may protect itself from loss by taking such stock in payment of the loan. (p. 640.)

CORPORATIONS—Transfer of Stock.—If corporate stock is valid in the hands of a transferee for value on the ground of estoppel against the corporation, he is entitled to have the stock transferred to him on the books of the corporation, although the law of the state creating it provides that no transfer of stock shall be valid, except as between the parties, until such transfer shall have been regularly entered upon the books of the corporation. (p. 643.)

CORPORATIONS—Transfer of Stock.—A statute providing that no transfer of stock shall be valid except as between the parties thereto, until such transfer shall have been regularly entered on the books of the corporation, is not intended to limit the power of the corporation to agree with a bona fide purchaser of its stock to enter the transfer on its books upon demand and notice, when no legal reason exists for its refusal. (p. 643.)

CORPORATIONS—Transfer of Stock.—A statutory provision that no transfer of stock shall be valid, except as between the parties thereto, until such transfer shall have been regularly entered on the books of the corporation, if not complied with, does not prevent a valid sale of stock for some purposes, or justify the corporation in captiously refusing to allow an entry on its books which shall make the sale valid for all purposes. (p. 644.)

CORPORATIONS—Transfer of Stock.—The right of a bona fide purchaser of corporate stock for value to a transfer thereof on

the books of the corporation is not a matter relating to its internal management, cognizable only in the courts of the state where the corporation was created, but is a contractual right accruing to the purchaser upon his acquisition of the stock and enforceable in another state where the corporation may properly be made a party. (p. 644.)

CORPORATIONS—Injunction on Sale of Stock—Parties.—One who has given notice to a corporation of his ownership of its stock is not bound by a subsequent judgment in a suit to which he is not a party, enjoining a sale of the stock by his vendor. (p. 645.)

CORPORATIONS—Transfer of Stock—Specific Performance.—A purchaser of corporate stock is not confined to an action for damages, for the wrongful refusal of the corporation to transfer the stock to him on its books, but may require it, by bill for specific performance to transfer the stock on its books, especially when the real and prospective value of the stock depends upon the future development and management of the corporate business. (p. 646.)

CORPORATIONS—Transfer of Stock—Laches.—A bona fide purchaser of stock in a corporation is not guilty of laches in delaying suit to compel the corporation to transfer the stock to him on its books, when it does not conclusively appear that such delay has been unreasonable, or that the corporation has been in any way prejudiced thereby. (p. 646.)

CORPORATIONS.—Bank directors have no implied authority or presumed power to bind the corporation by their admissions. (p. 646.)

H. F. Hollis, for the plaintiff.

G. F. Morris and B. S. Webb, for the defendants.

474 WALKER, J. No question is made that as against Bibber the bank became the owner of the stock in February, 1901, when Bibber transferred and assigned to it his certificate. He did all it was possible for him to do to vest the absolute title to the stock in his vendee. "It seems too clear for argument, that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them": Scripture v. Francetown Soapstone Co., 50 N. H. 571; Meredith Village Savings Bank v. Marshall, 68 N. H. 417, 44 Atl. 526. But so far as the corporation and interested third parties, without notice, are concerned, the vendee ordinarily does not acquire all the rights of a stockholder until the transfer is entered on the corporate records. The right to become such a stockholder after an assignment of the certificate is a valuable right, constituting in a very material sense a part of the consideration for the vendee's purchase. Without such a right enforceable in the courts of law, the sale of stocks would be

seriously hampered, resulting in much commercial and industrial inconvenience and embarrassment.

The bank when it purchased the Bibber stock was entitled to believe that by complying with certain reasonable regulations it would be recognized as, and in fact become, a stockholder in the corporation, possessing all the rights of other stockholders. Bibber's certificate which he assigned to the bank contained the solemn statement of the corporation, by its authorized officers and agents, that Bibber was the owner of three hundred and fifty shares of its stock, and that the stock was fully paid and nonassessable. The principal reason now assigned by the corporation for refusing to register the transfer to the bank and to issue to it a new certificate is that [475] Bibber paid nothing for the stock, and that under the laws of South Carolina he was not for that reason the owner of the stock represented by his certificate. If that conclusion of law is correct so far as Bibber is concerned, and if while he held the certificate he could not legally act as a stockholder or claim to be the owner of the stock, it would be most inequitable to hold that his vendee, having no notice of any infirmity in his title and relying upon the unequivocal assertion of the corporation contained in the certificate that he was the owner of the stock represented thereby, should be deemed to be in the same position with reference to the corporation that Bibber occupied. Under such circumstances, the most obvious principles of equity and justice require that the corporation should be estopped from denying the title of the innocent vendee who has given value for the stock. "The reason arises from the nature of a share certificate, which, as already stated, is a continuing affirmation of the ownership of the specified amount of stock by the person designated therein, or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good faith has a right to rely thereon and to claim the benefit of an estoppel in his favor as against the corporation": 2 Thompson on Corporations, sec. 2599. "If the certificates state upon their face that the shares have been fully paid up, the corporation will be estopped from denying the truth of this representation, and cannot charge the purchaser and transferee with further liability, although the shares have never in fact been paid up": 1 Morawetz on Corporations, sec. 306; 2 Cook on Corporations, sec. 416; Scripture v. Francetown Soapstone Co., 50 N. H. 571; Boston etc. R. R. v. Richardson, 135 Mass. 473;

Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; State v. McIver, 2 S. C. 25; Fraser v. City Council of Charleston, 11 S. C. 486; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. Rep. 345, 28 L. ed. 385. As no suggestion is made that the certificate was not regular in form and properly executed by the officers of the corporation, or that the corporation lacked the power to issue the stock for any purpose, it is not important to inquire whether the stock was legally and regularly issued to, or acquired by, Bibber. The corporation and the stockholders whom it represents are estopped to interpose that defense in this suit; and unless some other reason exists for its refusal to permit the record of the transfer to be made on its books and to recognize the bank as a stockholder, it would seem that the bank has established its right.

The fact that since the plaintiff is a national bank it has no authority or power to invest its funds in the stock of other corporations, does not demonstrate its inability, or want of corporate power, to become a stockholder in another corporation upon receiving the stock in payment of a legitimate claim against the former owner of it. "In the honest exercise of the power to compromise [476] a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good, or reduce, an anticipated loss. Such a transaction would not amount to a dealing in stocks": First Nat. Bank v. National Exchange Bank, 92 U. S. 122, 128, 23 L. ed. 679. In California Bank v. Kennedy, 167 U. S. 362, 366, 17 Sup. Ct. Rep. 831, 42 L. ed. 198, the court say: "No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders: National Bank v. Case, 99 U. S. 628, 25 L. ed. 448." See, also, Concord First Nat. Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. Rep. 739, 43 L. ed. 1007. The plaintiff bank, having in the ordinary course of business received the stock as collateral security for a loan to Bibber, afterward sought to protect itself from loss by becoming the owner of the stock. It enforced its lien on the security, and thus became the owner thereof. So far

as appears from the case, it was not dealing in stocks as a primary business, but, as incidental to its general business of loaning money, it acquired Bibber's title to the stock, as, upon the authorities, it had a right to do. How long it may hold the stock under the national banking laws, it is unnecessary to inquire. The fact of the good faith of the transaction, so far as material, was established by the finding of the superior court, to which no exception was taken.

As the plaintiff's right to relief, either legal or equitable, seems to be clear, it becomes necessary to consider whether the superior court had jurisdiction of the subject matter of the suit. No claim is made that the defendant was not regularly a party at the beginning of the litigation; hence it thereby became amenable to such orders as justice might require. Justice required the allowance of the amendment by which the action at law became an action in equity. To the ruling allowing the amendment the defendants took no exception; and they cannot now claim that they are not as fully parties defendant as they were when they appeared in the action at law. Nor is the position tenable that the court will not entertain jurisdiction in behalf of a foreign corporation: Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574. Both parties are properly in court. But it is argued that as the defendant corporation was chartered under the laws of another state, this court has no power to grant the relief sought, because it relates to the internal affairs of the corporation, which it is the peculiar and exclusive province of the courts of the incorporating state to supervise and regulate. [477] It may be conceded that the courts of one state either have not the power, or deem it injudicious to exercise the power, of determining rights dependent upon the essentially internal management of the affairs of a corporation chartered by the laws of another state. The forum of the latter state, it is held, affords the most appropriate place for such litigation, principally for the reason that ordinarily it alone possesses power adequate for the enforcement of all orders and decrees that justice may require: 6 Thompson on Corporations, sec. 7904. While there is not entire unanimity in the cases as to the correct definition of the expression "internal affairs" (Beale on Foreign Corporations, sec. 307; 3 Clark & Marshall on Private Corporations, secs. 864, 865), it cannot be controverted that a foreign corporation, legally made a defendant in an action

upon a contract which it had apparent authority to make, cannot escape liability thereon upon the mere ground that it is a foreign corporation. In such a case it enjoys no immunity or privilege not possessed by domestic corporations or individuals. If it has legally bound itself by a contract with a plaintiff who sues in his own right, and not as a stockholder or director of the corporation, the jurisdiction of the court to pronounce judgment against it cannot be questioned. The determination of its liability involves its external legal relations to one not in any way officially connected with it. If, having the power to do so, it issues its promissory note or bond, which is regularly transferred to the plaintiff in the ordinary course of business, it cannot escape liability in the courts of another state where it is properly made a defendant, though the construction of the contract may involve a consideration of the statutes and decisions of the state of its incorporation: Limerick Nat. Bank v. Howard, 71 N. H. 13, 93 Am. St. Rep. 489, 51 Atl. 641. The question relates, not to its internal management or affairs, but to its obligations to others arising from the prosecution of its legitimate business; and ordinarily those obligations are enforceable wherever the corporation can be made a party to the action: 19 Cyc. 1238.

"In the exercise of these functions, any crimes committed, penalties, fines, or forfeitures incurred by the violation of our laws, or any contractual liability to a citizen incurred, may be redressed in our courts, and in such case the jurisdiction does not depend on whether the corporation is doing business generally in this state, but the jurisdiction attaches in the one case to enforce a public law of the state against an offender, and in the other to enforce a contract, and in any case falling under either of these classes it is wholly immaterial from what foreign state or government the company derives its chartered powers, or to what extent it is doing business in this state. But where the act complained of affects the complainant only in his relation as a shareholder or [478] officer of the corporation, and no public right is involved, then the controversy must be said to relate to the internal affairs of the company; and in case of a foreign corporation, the great weight of authority is opposed to the jurisdiction of the court of equity": Bradbury v. Waukegan Min. Co., 113 Ill. App. 600, 608. See, also, March v. Eastern R. R., 43 N. H. 515; Kansas etc. Co. v. Topeka etc. R. Co., 135

Mass. 34, 46 Am. Rep. 439; Madden v. Pennsylvania E. L. Co., 181 Pa. St. 617, 37 Atl. 817, 38 L. R. A. 638; North Star Min. Co. v. Field, 64 Md. 151, 20 Atl. 1039; Guilford v. Western etc. Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

The plaintiff is not a stockholder of the defendant corporation, in the full and proper sense of that term. When it became the owner of the stock it occupied the position of a stranger to the corporation; and what it now seeks is the enforcement of the obligation of the corporation then incurred, if at all, to recognize it as a stockholder. As the corporation is estopped to urge as against the bank that the stock was not legally issued, it must be treated as valid stock when the bank became the owner of it. The case then stands as though the stock was valid and binding on the corporation in the hands of Bibber when he sold it to the bank. In that aspect, the plaintiff acquired a right by the transaction to have the stock transferred on the books of the corporation, so that it would possess as against the corporation and as against the world all the privileges of a stockholder, which it is conceded are valuable: 2 Cook on Corporations, sec. 442. The right to a transfer of the stock on the books of the corporation was one of the rights acquired by the bank at the time of the sale. The corporation had in effect agreed to make such transfer upon the presentation of the former certificate by a bona fide vendee and a demand for such transfer. In order to make its stock conveniently salable and thus to enhance its value as an investment, it represented to all who might desire to purchase its stock, and to all stockholders who might wish to sell their stock, that it would invest the purchasers thereof with all the rights of stockholders by making a record on its books of the fact of each sale as made. Having made such representations and assumed such obligations, it would be highly inequitable for it to repudiate the same to the prejudice of innocent purchasers of its stock.

In this respect the law of South Carolina is not peculiar. The statute of that state, providing that "no transfers of stock shall be valid except as between the parties thereto, until the same shall have been regularly entered upon the books of the corporation" (Code, sec. 1894), was not intended to limit the power of a corporation to agree with a bona fide purchaser of its stock to enter the transfer on its books upon demand and notice, when no legal reason exists

for its refusal. Such a construction of the statute would render [479] stock issued by corporations of that state of little value as investments in commercial dealings. For some purposes, and as against parties having prior claims or liens on the stock, an unrecorded transfer may be invalid, and is so regarded in South Carolina: State Bank v. Cox, 11 Rich. Eq. 344, 78 Am. Dec. 458; State v. McIver, 2 S. C. 25; Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; Efird v. Piedmont Land Co., 55 S. C. 78, 32 S. E. 758, 897; White v. Commercial etc. Bank, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94. This statutory provision, if not complied with, does not prevent a valid sale for some purposes, or justify the corporation in captiously refusing to allow an entry on its books which shall make the sale valid for all purposes, or which shall amount merely to a performance of its agreement to permit such record: 3 Clark & Marshall on Private Corporations, secs. 585, 586; Scripture v. Francetown Soapstone Co., 50 N. H. 571. This limitation is effective only so far as its enforcement is supported by reasons of commercial utility and fairness. To authorize the issuance of stock, and to declare the validity of its sale, even as against the corporation, to depend upon the caprice of the corporate officers in recording or refusing to record the transfer, would be an unreasonable construction of the purpose of the legislature in empowering the corporation to place its stock upon the market and to make it salable. It would in effect authorize the corporation to repudiate its contractual obligations. The defendant was not disqualified to bind itself to permit the record of the transfer of the Bibber stock to the plaintiff.

The plaintiff's right to a transfer, therefore, depends on the contract of the corporation. The bank is merely seeking the enforcement of a contractual obligation. It is not attempting in this proceeding to interfere with the essentially internal affairs of the corporation. It asks merely that the corporation—a party to the suit—shall recognize it as a stockholder, by virtue of its representation to the bank at the time of the sale that it would do so. The court is not asked to determine what the rights of a stockholder may be in this foreign corporation, or to exercise a discretion in behalf of the plaintiff in regard to the corporate management of the defendant. The relief sought is merely the enforcement of a contractual right which accrued to the plaintiff

when it bought the stock of Bibber. It then impliedly promised that it would permit the transfer: 3 Clark & Marshall on Private Corporations, sec. 603; Pinkerton v. Manchester etc. R. R., 42 N. H. 424; Bond v. Mount Hope Iron Co., 99 Mass. 505, 97 Am. Dec. 49. "A certificate of stock is not necessary to the complete ownership of the stock. But the corporation is bound, upon demand, to issue a certificate of stock to one who is entitled to it; and if it refuses, the stockholder may bring suit in equity to compel its issuance, or he may sue it in an action at law for damages": 1 Cook on Corporations, sec. 13.

480 It is further argued in behalf of the defendants that the New York judgment against Bibber bound the plaintiff; in other words, that the plaintiff, although not in fact a party to that suit, is concluded thereby, because according to the books of the bank Bibber alone was the owner of the stock in controversy, and because the sale of the stock by him vested no title in the bank. But the last reason, in view of the foregoing discussion, is not supported by reason or authority. The entire title which Bibber had to the stock passed to the bank at the time of the sale, February 25, 1901. May 1, 1902, the bank notified the defendant corporation that it was the owner of the Bibber stock; so that the corporation was apprised of the claim of ownership by the bank long before January 3, 1903, when the New York suit was instituted. The bank's title to the stock for all purposes then depended upon the mere formality of a record, since, as above suggested, the corporation had no legal ground for objecting to the record. Under such circumstances, at least, it cannot be said that the bank had no legal title to the stock in January, 1903, as against the corporation; and since Bibber was not only not the owner of the stock at that time, but was not in any sense the agent or representative of the bank—the true owner—in that litigation, the binding effect of the New York judgment upon the plaintiff is not apparent. The effect of the defendants' contention is to deprive the plaintiff of valuable vested rights by a judgment against a third party in a suit to which it was not a party, either directly or indirectly. It is unnecessary to cite authorities to show that such a result cannot be sustained: Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

It is also contended that the plaintiff is not entitled to a decree for specific performance since he has a plain and ade-

quate remedy at law. In view of the authorities to the contrary, that proposition does not demand extended discussion. It is "contrary to the overwhelming weight of authority. An action for damages does not always afford an adequate remedy for a refusal of a corporation to recognize a person as a stockholder; and it is well settled, therefore, that if a corporation wrongfully refuses to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, he may maintain a bill in equity to compel it to do so": 3 Clark & Marshall on Private Corporations, sec. 605; 1 Cook on Corporations, sec. 13. It is to be observed that this is not a proceeding to compel a vendor of stock to assign and deliver his certificate to the vendee under a contract of sale (Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626), but to compel the corporation to perform a merely clerical act for the benefit of a vendee who has already purchased and now holds the certificate. To deny him relief by specific performance, upon the ground that he could recover damages at law, would be, in effect, [481] to compel him to sell what he already owns at such a price as a jury might think it was worth. And especially ought a court of equity to decree specific performance when, as in this case, the real and prospective value of the stock depends upon the future development and management of the corporate enterprise.

So far as the claim that the plaintiff is guilty of laches in not bringing its suit sooner presents a question of fact, it has been found untenable by the superior court; and so far as a question of law is involved, it is sufficient to say that it does not conclusively appear that the plaintiff's delay in this respect was unreasonable or that the defendants have been prejudiced thereby in any respect: Douglass v. Concord etc. R. R. Co., 72 N. H. 26, 54 Atl. 883.

The exception to the exclusion of the testimony of the witness relating to an admission made by Greenwood, a director of the bank, who was also its vice-president, is unavailing. The ruling of the court was based upon the fact that it did not appear that the official of the bank was authorized to bind the bank by the proffered admission. Since there is no presumption of law that his official relation to the bank furnished or proved such authority (Low v. Connecticut etc. R. R., 45 N. H. 370; Wait v. Nashua etc. Assn., 66 N. H. 581, 49 Am. St. Rep. 630, 23 Atl. 77, 14 L. R. A. 356;

New Boston Fire Ins. Co. v. Upton, 67 N. H. 469, 36 Atl. 366), the exception presents no error.

Exceptions overruled.

All concurred.

The Effect of a Transfer of Corporate Stock without an entry thereof in the books of the company is discussed in the recent cases of Boone v. Van Gorder, 164 Ind. 499, 108 Am. St. Rep. 314; People's Bank v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144; McClung v. Colwell, 107 Tenn. 592, 89 Am. St. Rep. 961; First Nat. Bank v. Holland, 99 Va. 495, 86 Am. St. Rep. 898. In Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627, it is held that one is not deprived of his character as a bona fide purchaser of stock by the fact that the certificate is not surrendered and the transfer noted on the books of the corporation, although the certificate declares that it is transferable only on the books of the corporation. And in Lipscomb v. Condon, 56 W. Va. 416, 107 Am. St. Rep. 938, it is held that an unregistered transfer of stock, for which no certificate has been issued, when bona fide made, vests in the transferee a title superior to the claim of a subsequent attaching creditor of the transferrer. A provision that stock is transferable only on the books of the corporation does not, as between the parties, preclude a transfer without an entry on the books: Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115.

An Assignee of Stock who is entitled to have his stock recorded on the corporate books may compel the corporation to record it: In re Argus Printing Co., 1 N. Dak. 435, 26 Am. St. Rep. 639. See, also, Rice v. Rockefeller, 134 N. Y. 174, 30 Am. St. Rep. 658; Craig v. Hesperia Land etc. Co., 113 Cal. 7, 54 Am. St. Rep. 316.

A Foreign Corporation doing business in a state may be compelled by the courts therein to issue a certificate of stock to a citizen of the state in lieu of a pre-existing certificate which he has lost: Guilford v. Western Union Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407. But see, in this connection, Miller v. Smith, 26 R. I. 146, 106 Am. St. Rep. 699.

MOORE v. MARYLAND CASUALTY COMPANY.

[73 N. H. 518, 63 Atl. 490.]

INDEMNITY CONTRACTS—Parties.—If a judgment for personal injury is not collectible because of the insolvency of the judgment debtor, the judgment plaintiff cannot maintain a bill in equity against a casualty or insurance company to compel payment to him of money due upon an employer's liability policy held by the judgment debtor, unless the latter or its receiver is made a party to the action, and jurisdiction of him obtained so that he may be concluded by the decree rendered in the latter proceeding. (p. 648.)

EQUITY JURISDICTION—Parties.—Courts of equity will refuse relief when the rights of the parties who cannot be subjected to the jurisdiction of the courts are so bound up in the subject matter of the suit and relief sought that a decree would afford no protection to some of the parties in court, and would not bar a future suit

against them touching the same subject matter by the absent parties. (p. 648.)

JURISDICTION—Parties.—No court can adjudicate directly upon a person's rights without his being actually or constructively before the court. (p. 649.)

Cain & Benton, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

518 WALKER, J. The plaintiff seeks a decree ordering the casualty company to perform its contract with the railway company, which is not a party to the suit, by the payment to him of the money it agreed to pay the railway, upon the ground that as against the parties to the contract, and in view of the insolvency of the railway, he is equitably entitled to the money due under the contract. 519 The plaintiff was not a party to the contract, and whatever interest he has therein under the circumstances is equitable, not legal. If he is entitled to maintain a bill in equity for the money (Sanders v. Insurance Co., 72 N. H. 485), it cannot be denied that upon the same state of facts the railway, or its receiver, could maintain a suit for the recovery of the same fund, or that payment to the receiver would be an effectual bar to the plaintiff's suit against the casualty company. Upon the view most favorable to the plaintiff, his right of action against the objecting defendant is concurrent with that of the railway, and both arise from the same contract, are supported by the same facts, and would result in the same judgment for the sum stipulated in the contract. So far as the casualty company is concerned, their interests are not separable; and it would seem that a judgment against it in favor of one ought to be a bar to another suit against it for the same cause in favor of the other. Its equity to be thus protected is as great as the plaintiff's equity to be reimbursed for its injuries. If the plaintiff should obtain a judgment in this suit, it would not be a bar to another suit for the same cause by the receiver against the defendant in this or some other jurisdiction. Payment by the defendant to the plaintiff of the amount claimed might or might not be deemed to be equivalent to a payment to the receiver. But however that might be, it is clear a judgment in personam for the plaintiff here would not bind the receiver; and if he is not thus bound, the defendant is not protected against the legal liability of a judgment against it in favor of the receiver. The decree sought is based upon

the theory of adjudicating the rights of a party to the contract, who is not a party to the suit. "Equity courts will refuse relief when the rights of parties who cannot be subjected to the jurisdiction of the court are so bound up in the subject matter of the suit and relief sought that a decree would afford no protection to some of the parties in court, and would not bar a future suit against them touching the same subject matter by the absent parties": Stenchfield v. Robinson, 2 Hask. 381, 22 Fed. Cas. 1246. As was said by the court in Mallow v. Hinde, 12 Wheat. 193, 198, 6 L. ed. 599: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court": See, also, Busby v. Littlefield, 31 N. H. 193; Burnham v. Kempton, 37 N. H. 485; Champollion v. Corbin, 71 N. H. 78, 51 Atl. 674; Westminster Bank v. Electrical Works, 73 N. H. 465, 62 Atl. 971; Scribner v. Adams, 73 Me. 541; Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. Rep. 422, 33 L. ed. 792; California v. Railway, [520] 157 U. S. 229, 15 Sup. Ct. Rep. 591, 39 L. ed. 683; Story's Equity Pleading, sec. 81; Fletcher's Equity Pleading and Practice, sec. 21; Van Zile's Equity Pleading and Practice, sec. 50.

The fact that a creditor may obtain judgment against a single partner when the others are out of the jurisdiction (Towle v. Pierce, 12 Met. 329, 46 Am. Dec. 679), or against some of the stockholders of a corporation, under a statute creating the liability, when all of them are not before the court (Erickson v. Nesmith, 46 N. H. 371), furnishes no reason by analogy for the proposition that a personal judgment can be ordered against a debtor under a simple contract when the other party to the contract is not in court and has not authorized the plaintiff to represent him in such a way that he would become bound by the judgment.

Nor does the recent decision in Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574, support that contention. It was there claimed as a fact that the traction company, a domestic corporation and a party to the suit, by fraud had obtained possession of all the assets of another corporation, incorporated in another state, which was not a party to the suit, and it was said (page 285)

that "such right of action of the corporation against the pleader, a domestic corporation which has been duly served with process and appeared in the suit, is property within the jurisdiction of this state," sufficient to bind it by a judgment in rem in favor of creditors or complaining stockholders. Its property, which equitably belonged to the stockholders, had been wrongfully acquired by the traction company, and a suit for its recovery or for damages for its retention was properly held to be a property right of the foreign corporation within this jurisdiction, which was subject to adjudication here. But it does not follow that the plaintiff can maintain this suit upon a simple contract and bind an indispensable party, who is not before the court, by a judgment in personam, or by any judgment upon the facts reported. No right to property located within this jurisdiction is involved. This principle is fully recognized in Kidd v. New Hampshire Traction Co., 72 N. H. 273, 283, 56 Atl. 465, 66 L. R. A. 574, where it is said: "While the courts of a state have no jurisdiction to render a personal judgment against a nonresident individual or corporation not served with process within the state, their adjudication as to all property within the state is final and conclusive upon nonresidents as well as residents, upon such notice as the statutes of the state require."

Assuming the truth of the plaintiff's claim that he is not seeking to prejudice the rights of the receiver, but in effect to relieve him from the payment of the plaintiff's judgment—that a decree in favor of the plaintiff would be a benefit to, and not a burden upon, the receiver—it does not follow that the latter would elect to ratify what the plaintiff might thus accomplish for him, or abstain from suing the defendant upon the contract the plaintiff [521] here sets up. To the plaintiff's argument upon this point it is a sufficient answer that the judgment he seeks would not be such a conclusive adjudication of the rights of the parties to the contract as would protect the defendant from another action by the receiver for the same cause. Speculation as to what might result if such a suit were brought after a decree for the plaintiff in this suit and payment by the defendant of the sum demanded, would not be useful upon the question of the legal effect or validity of a judgment in this suit in its relation to the parties to the contract, one of whom confessedly is not bound thereby.

In this view of the case it becomes unnecessary to consider other questions argued by counsel.

Exception overruled.

All concurred.

If a Policy of employer's liability insurance provides that no claim shall lie against the insurer on the policy, unless brought by the assured to reimburse him for a loss sustained and paid by him in satisfaction of a judgment; and that if the insured shall take control of proceedings in an action to enforce a claim arising under the policy, he shall either pay the indemnity or secure the discharge of the insured, equity has jurisdiction to compel the insurer to pay the amount of the insurance in satisfaction of a judgment obtained by an employé against the insured, if the insurer has taken control of the proceedings as provided for in the policy, and has continued them to final judgment, though the insured was then insolvent and unable to pay such judgment, had made no claim for the insurance, and had incurred no expense nor made any payment on account of the litigation: Sanders v. Frankfort etc. Ins. Co., 72 N. H. 485, 101 Am. St. Rep. 688.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

ALBERT v. HAEBERLY.

[68 N. J. Eq. 664, 61 Atl. 380.]

DEED OF GIFT TO PARENT—Avoidance by Donor.—A deed of gift, executed by a young woman a few months after reaching her majority, to her stepmother, of whose family she had been a member since infancy, may be set aside on the application of the donor, if at the time of its execution there existed between the parties thereto a relation of trust and confidence in which the donee occupied the dominant position, and the donor, when making the deed, did not have competent and independent advice as to its effect. (pp. 653, 654.)

William I. Garrison and John W. Wescott, for the appellants.

George A. Bourgeois, for the respondent.

664 GUMMERE, C. J. The complainant, Mrs. Albert, seeks by her bill in this case to have set aside, and decreed to be null and void, so far as she is concerned, a deed of conveyance made by her and her sister, one of the defendants in the litigation, to the defendant Emily B. R. Haeberly, on the first day of December, 1902, for a plot of land in the city of Scranton, Pennsylvania. The decree of the court of chancery was in favor of the complainant.

Mrs. Haeberly is the stepmother of the complainant, having married the latter's father, William Robinson, in the year 1883, when the complainant was about two years old. Ten years later Robinson died, and four years after his death Mrs. Haeberly married her present husband. The conveyance, the validity of 665 which is attacked, was made by the complainant about three months after she had obtained her majority.

During all the period between the time of her father's marriage to Mrs. Haeberly and the execution of this conveyance the complainant was a member of Mrs. Haeberly's family. The facts so far recited are established by the testimony on both sides. There is much conflict in the evidence, however, concerning the character of the relations existing between the complainant and her stepmother during the latter part of this period. The complainant and some of her witnesses say that she was treated more as a household drudge than as a daughter, while Mrs. Haeberly and other witnesses testify that her treatment of the complainant was that of a beloved daughter, and that the affection which she bestowed upon the complainant was returned by the latter. Just what view of this phase of the case was taken by the court below is unknown to us, as no opinion was filed in that court. We are inclined to think that the preponderance of the testimony supports the contention of the defendant upon this point.

Assuming that the relations between the complainant and Mrs. Haeberly were those of a mother and daughter, the question presented for solution is whether this conveyance, which it is admitted by the defendants had no other consideration than love and affection, is voidable at the option of the complainant, the grantor. The relationship existing between a loving parent and child is universally conceded to be one of trust and confidence, and during the youth of the child, and even after the child reaches its majority, when it continues to be a member of the parent's family, the parent ordinarily occupies the dominant position.

In the case of Slack v. Rees, decided by this court at the last November term (66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393), we had occasion to consider the question of the validity of a deed of gift made by a father to his daughter, who was a member of his family, where, by reason of the physical condition of the father and his dependence upon the daughter for care and service, the relation ordinarily existing between parent and child had been reversed, and the daughter occupied the dominant position. We then declared, on the authority of earlier adjudications, [666] that a deed of gift, which reserved to the donor no power of revocation, was voidable at the option of the donor, or his heirs, when it appeared that at the time of its execution there existed between the parties thereto a relation of trust and confidence, in which the donee occupied the dominant position, and also that the

donor, when making the deed, did not have the benefit of competent and independent advice as to its effect. This decision controls the case now before us. An examination of the conveyance itself discloses that no power of revocation is reserved therein to the complainant, and there is nothing in the evidence submitted at the hearing which even suggests that, in the making of this gift, she received independent advice (or, in fact, any advice at all), either as to the nature or effect of the conveyance which she now seeks to avoid.

The decree appealed from will be affirmed.

An Infant's Gift of Property is revocable or voidable, like his contracts: See the monographic note to Craig v. Van Bebber, 18 Am. St. Rep. 628. As to the revocability of a gift made by a parent to his child, see James v. Aller, 68 N. J. Eq. 666, post, p. 654, 62 Atl. 427.

JAMES v. ALLER.

[68 N. J. Eq. 666, 62 Atl. 427.]

GIFTS—Power to Make—Improvidence—Revocation.—The law permits anyone to dispose of his property gratuitously, if he pleases, provided the rights of creditors are not injuriously affected thereby. He may, if he sees fit, reserve to himself the right to revoke his gift; or, if he desires, he may make the gift absolute and irrevocable, and his power in this regard does not depend upon the providence or the improvidence of his act. (p. 656.)

GIFT BY PARENT TO CHILD—Improvidence—Revocability. If a father, in the prime of life, in the full possession of his faculties, with a full understanding of the effect of his act, and without the exercise of any influence over him by his children, he occupying the dominant position in relation to them, makes an absolute gift to them, the gift, although improvident, is irrevocable. (p. 657.)

George H. Large and Paul A. Queen, for the appellants.

Benjamin W. Ellicott, for the respondent.

667 GUMMERE, C. J. The nature of the controversy between the parties and the facts submitted at the hearing are very fully set out in the opinion of the learned vice-chancellor before whom the case was tried. It is unnecessary to state them in full. Briefly, the following case is presented: In the spring of the year 1880, Llewellyn James, the complainant, conveyed to his children, defendants herein, his home-

stead property in the village of High Bridge, reserving to himself the right to occupy it so long as he should desire to do so. At the same time he assigned to them two mortgages aggregating four thousand two hundred dollars. In the autumn of the year 1881, he gave to his daughter Lydia Aller, certain notes and other securities amounting to four thousand dollars. In making these several gifts he reserved to himself no power to revoke them. In June, 1902, he filed his bill in this cause seeking to annul these several transactions. In it he rested his right to relief as to the conveyance of his homestead and the assignments of the mortgages upon the ground that he was induced to sign these papers by Mrs. Aller and her husband, through false representations made by them to him as to the character thereof, and without any knowledge of their real nature. His contention as to the notes and other securities given to Mrs. Aller in the autumn of 1881 is that they were delivered to her to hold in trust for him. The defense set up was that the conveyance of the homestead and the assignment of the mortgages were made by the complainant to his children as a gift at the time of his second marriage, for the purpose of making provision [668] for their support; and that the notes and other securities given by him to Mrs. Aller in 1881 were not intended by him to be held by her for his benefit, but that his purpose, expressed at the time, was that they were delivered to her as an absolute gift for herself and her sisters.

A mass of testimony was taken in the case, from a consideration of which the learned vice-chancellor reached the conclusion that in making the conveyance of the homestead and the assignments of the mortgages the complainant thoroughly understood the nature of the papers which he was signing; that his purpose in executing these several papers was to make a gift to his children of the property which they transferred; that no influence whatever was exerted upon him by his children to induce him to make this gift, and that he made the transfers voluntarily and deliberately, after consultation with his counsel. He held that a gift made by a father to his children, under these conditions, when not unreasonable in amount (and this he considered was not), was irrevocable to the donor, and that the complainant was not entitled to relief upon this part of the case.

As to the transaction of the autumn of 1881, the vice-chancellor concluded from the proofs that the notes and other

securities were given by the complainant to his daughter, Mrs. Aller, for the benefit of herself and her sisters; that the gift was made freely by the father to carry out his wishes expressed at the time, and without the exercise of any influence on the part of the daughters, and that no power to revoke the gift was reserved by him. The vice-chancellor considered, however, that the gift was improvident, because, by making it, the complainant devested himself of all the property then owned by him, and held that for this reason it was inequitable for the defendants to retain this gift, after a demand for its return made upon them by the complainant, and decreed that they should pay back to him the amount thereof, less certain moneys which had been advanced by them to him prior to the time of the filing of the bill. From that portion of the decree which annuls the gift of 1881 the defendants have appealed.

Mr. James, at the time for making the gift which was set [669] aside, was, as is stated in the opinion of the vice-chancellor, in the prime of life, and was steadily earning from one hundred dollars to three hundred dollars a month, and sometimes as much as five hundred dollars. It may well be doubted whether a man in such a situation necessarily acts improvidently in giving to his children the property which he has then accumulated. But assuming this to be so, it does not, in our view, afford any ground for declaring such a transaction voidable at his option. The law permits anyone to dispose of his property gratuitously, if he pleases, provided the rights of creditors are not injuriously affected thereby. He may, if he sees fit, reserve to himself the right to revoke his gift; or, if he desires, he may make the gift absolute and irrevocable, and his power in this regard does not depend upon the providence or improvidence of his act. It has, indeed, frequently been declared that where a relation of trust and confidence exists between the donor and the donee, and the donee occupies the dominant position, the fact that the gift is improvident is of great importance in determining whether it was the voluntary, well-understood act of the donor, and that the failure of the donor to reserve to himself a power of revocation will vitiate the transaction. The two cases referred to by the vice-chancellor in support of his conclusion that the gift should be set aside are of this character. In Garnsey v. Mundy, 24 N. J. Eq. 243, the donor was a young woman who had just reached her majority. The gift was to her mother,

in trust for the donor's child. It was made at the solicitation of the mother, without any independent advice to the daughter, and without the reservation to her of any power of revocation. The proofs made it clear that the donor did not understand the provisions of the deed which she executed, nor their effect; that she did not suppose the conveyance would place the property beyond her reach and control, and that the donee supposed that the gift was, and intended that it should be, revocable. In Powell v. Powell, [1900] L. R. 1 Ch. Div. 243, the donor was a young woman who had attained the age of twenty-one years shortly before making the deed which was set aside. The donee was her stepmother. The gift was held to be the result of strong pressure brought to bear upon the donor by the donee. The [670] underlying distinction between cases like those just referred to and the present one, as it seems to us, is the relationship existing between the parties. Where no relation of trust and confidence exists between the donor and donee, or where, when such relation does exist, the donor, and not the donee, occupies the dominant position, the rule laid down in those cases has no application, and a gift absolute in its terms, made voluntarily and with a full understanding of its effect, cannot be revoked by the donor, either by his own act alone or with the aid of a judicial tribunal. Such is the case now before us. The respondent, in the prime of life, as has already been stated, in the full possession of his faculties, as the case shows, and without the exercise of any influence over him by his children, made this gift to them. At that time no conditions existed to justify the conclusion that the original relation existing between parent and child (i. e., a relation where the parent occupies the dominant position) had been reversed, and that the children then occupied that position. His purpose, at the time of making the gift, was to make them the absolute owners of the property donated. It was his to dispose of as he saw fit. The gift was intended by him to be, and was, irrevocable. That being so, he has no legal right to now require the return of the property with which he then parted.

The portion of the decree appealed from should be reversed, and a decree entered in conformity with the view herein expressed.

FORT, J., Dissenting. I am unable to agree with the view taken by the majority of the court in this case.

I agree with the opinion of Vice-Chancellor Emery in its entirety, and vote to affirm for the reasons given by him in the court of chancery.

Judge Vroom concurred in this dissent.

A Gift Made Perfect by delivery and acceptance, by a competent person, is irrevocable: Williamson v. Johnson, 62 Vt. 378, 22 Am. St. Rep. 117; Pickslay v. Starr, 149 N. Y. 432, 52 Am. St. Rep. 740. So long, however, as the gift remains incomplete, the donor may decline further performance and assert title to the property: Appeal of Walsh, 122 Pa. St. 177, 9 Am. St. Rep. 83; Smith v. Peacock, 114 Ga. 691, 88 Am. St. Rep. 53.

A Gift from a Father to His Minor Child may be as valid as if made by a stranger: Williams v. Walton, 8 Yerg. 387, 29 Am. Dec. 122; Second Nat. Bank v. Merrill, 81 Wis. 142, 29 Am. St. Rep. 870. A voluntary conveyance by a parent to his or her child is not presumed to be invalid, unless a confidential relation exists between them which gives the child dominion over the parent: Bauer v. Bauer, 82 Md. 241, 33 Atl. 643; Yeakel v. McAtee, 156 Pa. St. 600, 27 Atl. 277.

CHAMBERLAIN v. CHAMBERLAIN.

[68 N. J. Eq. 736, 59 Atl. 813.]

VOID MARRIAGE—Removal of Impediment.—If a woman contracts a second marriage in the belief that her first husband is dead, when in fact he is not, but subsequently she obtains a divorce from him, after which she and her second husband continue, as before, to live together as husband and wife, with the intention of being such, an actual marriage is established. (p. 660.)

Elmer King, for the appellant.

Peter J. McGinnis and John W. Ward, for the respondent.

737 GARRETSON, J. The complainant filed her bill against the defendant under the twentieth section of the divorce act, alleging that her husband had left her and refuses to support her, and praying for support and maintenance. The only defense which it is necessary to consider is, that the defendant is not the husband of the complainant, and therefore is not liable to support her.

The complainant, under her maiden name of Mary Walsh, married William Tissell, March 29, 1871. William Tissell left Mary Tissell March 12 or 15, 1877, and went to St. Louis and thence to Oak Grove, Texas. About July, 1877, a letter was received by Mary Tissell from William Tissell. Mary Tissell, under the name of Mary Walsh, was married to

Stroud H. Chamberlain April 4, 1880, by a clergyman in the city of Brooklyn. On May 8, 1880, the complainant, under the name of Mary Tissell, filed a petition for divorce, upon the ground of desertion, against William Tissell, and decree was granted thereon June 30, 1881.

Prior to the marriage of the complainant and defendant in 1880 they both believed that William Tissell was dead, and they continued in that belief until after the present suit was instituted, when there was evidence to show that he was still alive. If William Tissell was alive in April, 1880, when the complainant was married to the defendant, that marriage was invalid. When the impediment of her former marriage was removed [738] by the decree of divorce, then the complainant might legally become the wife of the defendant.

The complainant testified that, while she believed Tissell was dead when she married Chamberlain, she procured the divorce from Tissell for the reason that she and Chamberlain talked of getting a little property, and she was afraid that something might occur that might do harm in that way.

After the complainant and defendant were married in 1880 they lived together as husband and wife until the separation, which occurred shortly before the commencement of this suit; each supposed that the relationship between them was lawful, and that of husband and wife; he addressed her and introduced her as his wife; she addressed him and introduced him as her husband; they gave a mortgage upon property of the defendant June 25, 1885, in which she is described as his wife and which she acknowledged as his wife.

From the time of the marriage in 1880, to the commencement of the suit it was the intention of both the complainant and the defendant, as they state, that their relations should be lawful and not meretricious; they were by law meretricious, however, down to the time of the divorce of Tissell, because of Tissell living, but the impediment which rendered them meretricious having been removed, and the lawful intent still continuing, it would be unjust not to give that intent effect if possible.

In connection with the intent of both parties, as admitted by them, we have evidence to show that they manifested that intent to others after the divorce in such way as to fully establish the legality of their relationship.

Emily J. Campbell testifies that the defendant on one occasion, in presence of his wife, said: "Here is Mary's divorce

from her first husband. I would not have shown it to you, but you knew her first husband, and I want you to know she is my legal wife." Mary Booth testified to an occasion when both were present and she had been told by one of the neighbors that Mrs. Chamberlain had been divorced, and says "she felt so badly, they came down and said they had the divorce papers and were willing for us to see them, because father made the lease; they were anxious for us to know they were married," and Mr. Chamberlain [739] "said she was his wife, and she felt bad and cried, and he told her not to worry."

This evidence was a manifestation of an intent to live together as husband and wife, and with the intention and the actual so living, an actual marriage is established.

In Collins v. Voorhees, 47 N. J. Eq. 555, 24 Am. St. Rep. 412, 20 Atl. 626, 14 L. R. A. 364, Chief Justice Beasley, in an opinion denying a motion for a reargument, speaking of the opinion of Lord Westbury in the Breadalbane case, said: "The doctrine of that case is supported by nothing that preceded or that has followed it, and is altogether anomalous, and, as it seems to me, it was properly rejected by this court. In that case the court acted upon the principle that if a man and a woman agreed to live together adulterously with a simulation of marriage, that there should be an inference of a subsequent valid marriage from the fact that such simulation had been continued after the death of the husband of the adulteress. Why such an inference is to be thus deduced is not apparent, unless it be for the promotion of adultery. By its prevalence the adulterous purpose is converted into a matrimonial purpose without a particle of reasonable evidence in support of the alleged change of intention. Lord Westbury strangely compares the case before him with those instances where the parties intended, originally, to marry, and not to commit adultery, their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively rest upon entirely different foundations, for when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial, subsequent to the removal of such impediment, is the carrying into effect by the parties of their original purpose; but when the original purpose was to live in adultery, the evi-

dence, under similar circumstances, must be sufficient to show an abandonment of such purpose and the execution of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest." We think [740] that this reasoning of the chief justice abundantly sustains the complainant's contention in this case.

The decree below is affirmed.

A Marriage void because one of the parties is under a legal disability may be good as a common-law marriage if they continue to live together as husband and wife after the removal of the disability: Land v. Land, 206 Ill. 288, 99 Am. St. Rep. 171, and cases cited in the cross-reference note thereto.

CASES AT LAW

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

CIGARMAKERS' INTERNATIONAL UNION v. GOLDBERG.

[72 N. J. L. 214, 61 Atl. 457.]

CONSTITUTIONAL LAW—Penalty for Using Trade Labels.—A statute providing for the registration of a label by any organization of persons to designate the wares upon which its members have expended labor, and providing that, in the event of an unlawful use of such label by a person other than a member, the organization may, in addition to full compensation for the injury, recover from the offender a penalty of not less than two hundred nor more than five hundred dollars, for the use and benefit of the organization, is unconstitutional as authorizing the taking of property without due process of law, in that it confers on the plaintiff the power of fixing, within the limits prescribed, the amount of the penalty to be exacted for its own use. (p. 664.)

Henry Hahn, for the plaintiff in error.

Joseph A. Beecher, for the defendant in error.

214 DIXON, J. By an act passed March 15, 1898 (Pamph. Laws, 83), it is made lawful for an organization of persons to register in the office of the Secretary of State a label to designate the wares upon which the work of any of its members has been expended, and it is made unlawful for any person other than the members to use such label or any counterfeit or imitation of the same. The act further provides (section 9) that if unlawful use of the label be made, the organization may, in the court of chancery, have such use enjoined and recover all damages resulting therefrom, together with all costs and expenses incurred by the complain-

ant [215] in such proceeding; and (section 10) may, in addition, in an action of debt brought in any court of law having civil jurisdiction, recover from the person offending a penalty of not less than two hundred dollars, nor more than five hundred dollars, for the use and benefit of the organization.

The present action was instituted by an unincorporated organization to recover a penalty of two hundred dollars by virtue of said tenth section, and at the trial, in the district court of Newark, the defendant moved for a nonsuit, on the ground that the enactment was unconstitutional. The plaintiff, however, had judgment, which, on appeal, was affirmed in the supreme court, and it is now before this court by writ of error.

In Gottlob v. Schmidt, 66 N. J. L. 180, 48 Atl. 588, the supreme court rightly held that as the penalty is to be sued for in an action of debt, the amount to be recovered must be determined, within the limits prescribed, by the plaintiff before the suit is brought. The question presented, therefore, is whether the legislature could and did constitutionally confer on the plaintiff the power of fixing, within limits defined, the penalty to be exacted for its own use.

By the express terms of the statute the penalty is to be recovered in addition to the damages, costs and expenses necessary to give full compensation to the plaintiff for the injury suffered through the unlawful use of the label. Enactments of this nature go, in my opinion, to the very verge of the sphere protected from legislative interference by the principle implied in the constitution that the private property of one person shall not be taken for the private use of another. But under the authority of decided cases, it must be conceded that the legislature is not prohibited from enacting that the penalties imposed for public offenses, which work special injury to individuals, shall be recovered for the benefit of those individuals, although they exceed compensation for the injury sustained. A controlling authority on this subject is Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. ed. 463, where the federal supreme court held that a [216] state statute which gave to the injured party double damages for the loss of cattle did not violate the constitutional interdict against depriving persons of property without due process of law. The right to punitive damages in certain cases and the rights of informers under penal statutes rest

upon a similar doctrine, which appears to be that the government need not take to itself for public use that which for public reasons it authorizes to be exacted from offenders against common or statutory law.

But an examination of the cases discloses that inasmuch as the penalty, when not required to compensate the injured party, must necessarily proceed on public considerations, the amount of the penalty is always ascertained by some public agency. Thus, in the case of exemplary damages and under many penal statutes and ordinances, a judicial tribunal fixes the amount. In other statutes the legislative body prescribes either the absolute sum or a standard for ascertaining the sum proportioned to the wrong done. But in the case now before us, none of these just limitations is observed. The legislature has attempted to devolve upon the private party the duty or power of weighing the public considerations on which the penalty should be measured. It has said, in effect, we do not know what penalty will be appropriate to prevent or to punish violations of this statute; we perceive that less than two hundred dollars would be inadequate, and more than five hundred dollars would be excessive, but beyond this we cannot decide; nor are we willing to submit the matter to some other public and impartial tribunal; we leave it to the determination of the party to be benefited thereby.

Such a course seems to us unconstitutional. The fixing of the precise legal penalty to be imposed must be essentially either a legislative function, in which only general considerations can have weight, or a judicial function, in which general considerations may be modified by special circumstances. As a legislative function the power has been partly exercised in the statute, which, under constitutional regulation must precede the commission of offenses. There remained, [27] to complete the object of government, only the judicial function. The power to discharge that function could not be conferred upon anybody without making provision for a hearing of the party concerned before the penalty to be borne by him was determined, and even with that provision it could not be conferred upon the party for whose benefit the penalty was to be exacted. Manifestly it was not delegated by the present enactment. A man cannot be regarded as discharging a judicial function when he reaches a determination in his own interest without hearing his adversary.

No judicial authority has been found sanctioning a statute like that now in question. The case of Piper v. Chappel, 14 Mees. & W. 624, has been referred to as tending in that direction. There the Plumbers Company of London, under its ancient charter, made a by-law prescribing certain duties to its members, and declaring that for any violation a penalty should be incurred of five pounds, or less, at the discretion of the master and wardens of the company, but not less than forty shillings. This form of prescribing the penalty was held by the court of exchequer to be reasonable, upon the ground, as I read the case, that by the charter the company had over its members both legislative authority—"to make reasonable ordinances and provide penalties"—and judicial authority—"to hold a court or convocation to determine respecting the violation of ordinances." Under the legislative authority it enacted the by-law and penalty, and under the judicial authority it adjusted the penalty to the particular case. The power of the British parliament to lodge such authority in the company was not questioned, and is, I suppose, unquestionable. But, without adverting to the limitations of legislative power in this country, the delegation to a corporation of authority over its own members is totally different from the delegation of like authority to private persons, to be exercised over individuals in the community at large.

Our conclusion is that under this tenth section the powers of government have not been and cannot be fully exercised for the imposition of penalties upon offenders against the [218] statute—in other words, that the exaction of penalties in accordance with its provisions would be the taking of property without due process of law—and consequently those provisions are invalid.

The judgment under review should be reversed.

A Statute making a railway company, neglecting to maintain proper fences along its track, liable in double damages for stock straying on its tracks and being killed, is not unconstitutional as working a deprivation of property, without due process of law: Cairo etc. R. R. Co. v. Peoples, 92 Ill. 97, 34 Am. Rep. 112. Neither, it seems, is a statute imposing a penalty on railroad companies making an overcharge in freight or passenger rates: Hall v. Norfolk etc. R. R. Co., 44 W. Va. 36, 67 Am. St. Rep. 757.

SIGGINS v. McGILL.

[72 N. J. L. 263, 62 Atl. 411.]

LANDLORD'S LIABILITY for Condition of Stairway in Apartment House.—Where a landlord rents apartments in a building to several families separately, but retains the possession or control of the passageways and stairways for the common use of the tenants and those having occasion to visit them, he is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has thus invited others to make of them. (p. 667.)

Bedle, Edwards & Thompson, for the plaintiffs in error.

Joseph Anderson, for the defendant in error.

263 PITNEY, J. Plaintiff was a tenant of the defendants, occupying an apartment in a building owned by them in Jersey City. There were several apartments in the building, and these were separately rented out by defendants to different 264 families. The halls and stairways of the building were used in common by the several tenants. While descending one of these stairways the plaintiff stumbled and fell, sustaining personal injuries. This action was brought to recover compensation therefor from the landlords, upon the ground that the plaintiff's fall was due to the bad condition of the stair covering.

The verdict and consequent judgment were in favor of the plaintiff. There were motions for nonsuit and for direction of a verdict in favor of defendant, both of which were denied. They were based in part upon the ground that plaintiff knew, or ought to have known, the condition of the stair covering, and either had assumed the risk or by his own negligence had contributed to his injury. These grounds were untenable, there being at least disputable questions of fact for the jury's determination with respect to the plaintiff's knowledge of the condition of the stairs and with respect to his care while using them.

The motions were based, also, upon the ground that there was no liability on the part of the landlords for the condition of the staircase. The learned trial justice, having refused the motions, submitted the case to the jury with this instruction—that since the building was occupied by several families, who had the use of the halls and stairways in common, there rested upon the defendants the duty of using reasonable care to keep the halls and stairways in proper condition for

the common use of the tenants. To this instruction, as well as to the denial of the motions, exception was duly sealed.

In this state it is established as a general rule that the landlord is not liable for injuries sustained by a tenant or his family, or guests, by reason of the ruinous condition of the premises demised, there being upon the letting of a house or lands no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenants. So it was held by the supreme court, in Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380, Mullen v. Rainear, 45 N. J. L. 520; Clyne v. Helms, 61 N. J. L. 358, 39 Atl. 767, and Land v. Fitzgerald, 68 N. J. L. 28, 52 Atl. 229, and, by this court, in Murray v. Albertson, 50 N. J. L. 167, 7 Am. St. Rep. 787, 13 Atl. 394.

[265] But it is recognized that this rule does not apply to those portions of his property (such as passageways, stairways and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them, the ways being used as appurtenant to the premises demised. With respect to such ways it has been held by our supreme court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them: Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481; Gleason v. Boehm, 58 N. J. L. 475, 34 Atl. 886, 32 L. R. A. 645. This doctrine, we think, is indubitably sound. It is in nowise opposed to the rule which exempts the landlord from liability for the condition of premises that are demised, but is plainly distinguishable therefrom. In the case of a demise, the entry and occupancy are pursuant to an estate vested in the tenant and are exclusive of the landlord, while in the case of passageways and stairways that are retained in the legal possession of the landlord and are simply used by the tenants as appurtenances to the property demised to them, their ingress and egress are by virtue either of invitation or of necessity. This is the ground of the distinction as pointed out in Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295, cited with approval in Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481. In Phillips v. Library Co., 55 N. J. L. 307, 27 Atl. 478, which

was a case of one of several tenants of a building injured while using a path to the rear that was arranged for the common use of the tenants, this court affirmed the responsibility of the landlord for the condition of the path.

The judgment under review should be affirmed.

The Doctrine of the Principal Case will be found discussed in the monographic note to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 520-523; and in the recent case of Widing v. Penn. Mut. Life Ins. Co., 95 Minn. 279, ante, p. 471, and note. In Ryan v. Delaware etc. R. R. Co., 72 N. J. L. 266, it is held, on the authority of the principal case, that where a landlord leases a tenement house to three different families, and the only water-closets pertaining to the premises are two in the back yard, which are used indiscriminately by the several tenants, but which are not covered by the leases, being retained in his possession subject to the common use of the tenants by his permission, he is under the duty to see that these closets are reasonably safe for a woman who visits one of the tenants to do the latter's washing.

GUINN v. DELAWARE AND ATLANTIC TELEPHONE COMPANY.

[72 N. J. L. 276, 62 Atl. 412.]

NEGLIGENCE—Dangerous Acts—Public Duty.—Where one undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. (pp. 669, 670.)

ELECTRIC WIRES—Injury to Trespasser.—If a guy wire used by a telephone company breaks and falls across an electric light wire below belonging to another company, and the broken end drops to the ground in an open field across which people are accustomed to travel without objection from the land owner, the telephone company is not exempt from liability for the death of a person who there comes in contact with the wire, on the ground that, as against the owner of the land, the deceased was a trespasser or bare licensee. (p. 670.)

ELECTRIC WIRES—Duty to Place Guards Between.—In an action against a telephone company for the death of a person caused by contact with one of its guy wires which had broken and fallen across an electric light wire below belonging to another company, and thereby had become charged with a deadly current of electricity, it is permissible for the jury to infer that the omission of a guard between the two wires was an act of negligence. (p. 671.)

ELECTRIC WIRES—Duty as to Parallel or Intersecting Wires. Where the danger of the guy wire of a telephone company breaking and falling across an electric light wire belonging to another company arises after the construction of the telephone line, and is due to the running of the electric light wire below the guy wire, the care required of the telephone company changes with the changed circumstances. (p. 671.)

Edward Ambler Armstrong, for the plaintiff in error.

Peter Backes, for the defendant in error.

[276] SWAYZE, J. William C. Guinn, a lad thirteen years of age, was killed by contact with a guy wire charged with electricity. The wire was of a character used for telephone construction—copper wire of a tensile strength of two hundred and fifty pounds. It was attached to a pole on which were strung wires of the defendant alone. There was no proof except by inference that the defendant erected or owned the pole, or had attached the wire. In answer to an interrogatory, the defendant stated that the wire had been inspected May 27 or 28, 1904, about three weeks before the injury. No testimony [277] was offered by the defendant. The trial judge left it to the jury to say whether the wire was put there by the servants of the defendant. We think there was sufficient evidence to warrant the inference that such was the fact.

The injury was caused by the guy wire breaking and falling on an electric light wire belonging to another company. The broken end fell in the grass in a field belonging to Gulick. Across this field people were accustomed to travel without objection, but as far as appears without other right. The boy's body was found still in contact with the guy wire shortly after the shock. It does not appear that he had any right to be on Gulick's property except such as may be inferred from the facts stated. The contention of the defendant is that it was under no duty to the decedent for the reason that he was a trespasser on Gulick's property, or at best a mere licensee.

The liability of the defendant rests upon the fact that it was maintaining wires which might become charged with a deadly current of electricity: New York etc. Teleph. Co. v. Bennett, 62 N. J. L. 742, 42 Atl. 759; Brooks v. Consolidated Gas Co., 70 N. J. L. 211, 56 Atl. 168.

The duty to exercise care is established as to travelers upon the highway and employés of the defendant or of another company who in the exercise of their rights are likely to come in contact with the wires, and of persons who are lawfully in a place of proximity to the wires. The question presented in this case is whether the duty exists also as to third persons who are not at the time in the exercise of any legal right. The principle underlying the case is stated by Chief Justice Beasley, in Van Winkle v. American Steam Boiler Co., 52 N.

J. L. 240, 19 Atl. 472, to be that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill.

The test of the defendant's liability to a particular person is whether injury to him ought reasonably to have been [278] anticipated. In the present case the guy wire was stretched over an open field, across which people were accustomed to travel without objection by the land owner. The adjoining field was used as a ballground. It was probable that if the guy wire broke someone crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee as against the land owner cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the land owner alone, not a public wrong nor a wrong to the defendant.

The case differs from one where a trespasser or licensee seeks to recover of the land owner. A land owner may in fact reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. It is these considerations which led this court to deny the liability of the defendant in the turntable cases: Turess v. New York, etc. R. Co., 61 N. J. L. 314, 40 Atl. 614; Delaware etc. R. Co. v. Reich, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 831, and in Friedman v. Snare & Triest Co., 71 N. J. L. 605, 108 Am. St. Rep. 764, 61 Atl. 401, 70 L. R. A. 147.

The general rule is that a person is liable for those results of his negligence which are reasonably to be anticipated; the exemption of the land owner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land, but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with.

There is no proof that the defendant had any right to maintain the pole and wire, but even if it had the deceased is not shown to have interfered with the defendant's rights. The right to maintain the pole and wire did not involve the right to have the wire swing loose or occupy another portion

of the field. Whoever interfered with the pole and wire in place might be a trespasser, but he would not be a trespasser upon the defendant's rights if he came in contact with the wire elsewhere.

279 The trial judge, in his charge, rested his refusal to nonsuit upon the theory that the defendant had no right to stretch the guy wire, and he therefore refused to charge that the mere fact that the boy was there as a licensee defeated the plaintiff's right to recover. We think that even if the defendant had a right to stretch the guy wire, the plaintiff might still be entitled to recover. There was no error in the refusal to charge.

The judge was asked to charge that the jury must be satisfied by the greater weight of the testimony that the defendant company was negligent or the verdict must be for the defendant. He charged that it must appear by the weight of probabilities that the defendant's servants put the guy wire there. He then left it to the jury to say whether the defendant was negligent in doing something which it did, or in leaving undone something which it should have done.

In a case where the testimony was in conflict the defendant would be entitled to have this request charged, but in the present case there was no conflict of testimony, and the only question was whether the jury would draw an inference of negligence from undisputed facts. Under the decision of this court in Newark Electric etc. Co. v. Ruddy, 62 N. J. L. 505, 41 Atl. 712, 57 L. R. A. 624, affirmed, Ruddy v. Newark etc. Co., 63 N. J. L. 357, 46 Atl. 1100, 57 L. R. A. 624, in the absence of explanation by the defendant of the cause of the breaking of the wire, no other inference was open. The present case is even stronger, for here there was proof that the wire was of less tensile strength, though of greater durability, than the wire ordinarily used for that purpose.

It was permissible for the jury to infer that the omission of a guard between the electric light wire and the guy wire was an act of negligence: Rowe v. New York etc. Teleph. Co., 66 N. J. L. 19, 48 Atl. 523.

Although the danger arose after the construction of the telephone line, and was due to the running of the electric light wires below the guy wire, the care required of the telephone company changed with the changed circumstances: Rowe v. New York etc. Teleph. Co., 66 N. J. L. 19, 48 Atl. 523.

The judgment should be affirmed, with costs.

The Duty and Liability of corporations maintaining electric wires are discussed in the monographic note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 515-539. Generally speaking, such corporations are held to the highest degree of care: Gilbert v. Duluth General Elec. Co., 93 Minn. 99, 106 Am. St. Rep. 430; Barto v. Iowa Tel. Co., 126 Iowa, 241, 106 Am. St. Rep. 247; Parsons v. Charleston etc. Elec. Co., 69 S. C. 305, 104 Am. St. Rep. 800. As to whether they are under any duty to trespassers and licensees, see Cumberland Tel. etc. Co. v. Martin, 116 Ky. 554, 105 Am. St. Rep. 229; note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 538.

McDONALD v. CENTRAL RAILROAD COMPANY.

[72 N. J. L. 280, 62 Atl. 405.]

CARRIERS—Passenger's Right to have Train Stop at Destination.—If a passenger, before buying a ticket, asks the agent whether a certain train stops at his destination, and is told, and given a time-table showing, that it does stop there, he has a right to assume that it will, and his ejection at a preceding station is wrongful. (pp. 673, 674.)

CARRIERS—Initial Railway as Agent for Connecting Lines.—If a person buys a coupon ticket over connecting railways, knowing that in issuing it the initial carrier acts only as agent of the others, the relation of carrier and passenger does not exist between him and the first railway after the train leaves its road. (p. 675.)

CARRIERS—Eviction of Passenger.—Damages for the Indignity and consequent injury to his feelings may be allowed a passenger for his wrongful eviction from a train. (p. 675.)

George Holmes, William A. Barkalow and Vredenburgh, Wall & Van Winkle, for the plaintiffs in error.

John K. English, for the defendant in error.

281 SWAYZE, J. This is an action of tort. The first count of the declaration is for negligently misinforming the plaintiff as to the train which he should take to go from Elizabeth to Chester, Pennsylvania. The second count is for a wrongful ejection of the plaintiff at Philadelphia. The plaintiff recovered damages for the ejection and judgment was entered against both companies.

Whether the ejection of the plaintiff was wrongful depends upon the contract. The material facts are as follows: Just before buying a ticket from Elizabeth to Chester he inquired of the ticket agent at Elizabeth whether the train which he afterward took stopped at Chester, and was informed that it did. He then asked for a timetable and ticket and received both. The timetable purported on its face to be one of the

Royal Blue Line, and bore the names of the Central Railroad of New Jersey, the Philadelphia and Reading railway and the Baltimore and Ohio railroad. There was no other proof as to the company by which it was issued. The timetable showed that the train stopped at Chester. No question arose until just before the train reached Philadelphia, when the conductor of the Philadelphia and Reading railway informed the plaintiff that the train did not stop at Chester and that he would have to change cars at Philadelphia. When the train reached the station in Philadelphia the conductor of the Baltimore and Ohio railroad took charge. He came into the car with two policemen, inquired for the man who wanted to go to Chester and told the plaintiff he would have to get off, to which the plaintiff replied that he would have to use force; the conductor grabbed the plaintiff by the shoulder and the plaintiff thereupon left the car. The plaintiff had been in the habit of taking the same train, which had previously stopped at Chester.

It was not questioned on the trial or on the argument here that the ticket agent in Elizabeth was authorized to sell tickets from Elizabeth to Chester over the Central Railroad of New Jersey, the Philadelphia and Reading railway and the Baltimore and Ohio railroad. The ticket appears on its face to [282] be issued by the Central railroad, and has attached three going and three returning coupons in the usual form of a coupon ticket. The coupons between Bound Brook and Philadelphia purport to be issued on account of the Philadelphia and Reading, and the coupons between Philadelphia and Chester on account of the Baltimore and Ohio. It is not necessary to decide that the terms of the published timetable became by the mere fact of publication a part of the contract, as was held by a majority of the court of king's bench, in Denton v. Great Northern Ry. Co., 5 El. & B. 860, and decided by the court of appeals in Le Blanche v. London etc. Ry. Co., L. R. 1 C. P. Div. 86, 45 L. J. C. P. 521, 5 Eng. Rul. Cas. 392.

The difficulty suggested by Mr. Pollock (Pollock on Contracts, 7th Eng. ed., 19), does not arise in this case, for the stopping of the train at Chester was an express condition upon which the plaintiff bought his ticket, and the timetable showing that the train made the stop at Chester was handed him with the ticket. The fact that a timetable furnished by the Baltimore and Ohio railroad to the conductor (but not, as far

as the case discloses, to the public or to the ticket agent at Elizabeth) showed that the train did not stop at Chester, in no way alters the case. The train had been in the habit of stopping, and the timetables of the ticket agent at Elizabeth bearing the name of the Baltimore and Ohio, and not denied to have been authorized by that company, showed such a stop. While the authority of the ticket agent to make the contract in question might be modified to correspond with the time-table furnished the conductor, there is no proof that it had been so modified. Whether it had been so modified was within the knowledge of the Baltimore and Ohio, and the failure to prove it justifies the inference that there had been no modification.

The plaintiff had the right to assume that the train would stop at Chester, as his contract required, and was not bound to believe the assertion of the conductor. He was entitled to make reasonable efforts to exercise his right: Runyan v. Central R. R. Co., 65 N. J. L. 228, 47 Atl. 422. He did no more than to require the conductor to make use of slight physical [283] force, and yielded immediately and left the car. We think the conduct of the conductor was actionable.

The question remains whether both defendants are liable. The conductor was in the employ of the Baltimore and Ohio Railroad Company, and it is liable for his acts on the principle respondeat superior. The other conductor whose route ended at Philadelphia was in the employ of the Philadelphia and Reading Railway Company. The only fact in the case to indicate liability on the part of the Central Railroad Company is the issue of the ticket. The plaintiff's case does not rest upon a tort of the ticket agent at Elizabeth, but upon the theory that the agent at Elizabeth had the right to make the contract, and was therefore guilty of no wrong. The Central railroad would be liable for a violation of its duty as a common carrier if that relation existed at the time between the plaintiff and the company: Haver v. Central R. R. Co., 62 N. J. L. 282, 72 Am. St. Rep. 647, 41 Atl. 916, 43 L. R. A. 84. Whether that relation existed depends on whether the Central contracted for the carriage of the plaintiff beyond its own line as principal or agent.

The ticket states that in selling the ticket to points on other roads the company assumes no responsibility beyond its own road. It may be questioned whether this provision was assented to by the plaintiff, and, if so, whether it oper-

ates to exempt the Central railroad from its common-law liability, or only to negative the assumption of any further liability beyond its own road. This need not be determined, since the other facts sufficiently prove that the Central railroad was, to the knowledge of the plaintiff, contracting only as agent as to transportation beyond its own road. The facts that there were separate coupons for different portions of the journey; that they bore the names, in plain type, of the connecting companies, and purported on their face to be issued, as far as the connecting roads were concerned, by the Central railroad as agent only, and that the plaintiff was familiar with the route, justify the inference, in the absence of any denial from the plaintiff, that he knew that the Central railroad was acting as agent only. The relation of common carrier and passenger did not exist as between the plaintiff and the Central Railroad [284] Company after the train left the Central's road. The case differs from Little v. Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445, and Dunn v. Pennsylvania R. R. Co., 71 N. J. L. 21, 58 Atl. 164. In both those cases the relation of carrier and passenger existed between the parties at the time of the injury. The case resembles, rather, Alabama etc. R. R. Co. v. Holmes, 75 Miss. 371, 23 South. 187.

There is no evidence that the Central railroad took any part in the management of the train beyond Bound Brook. As far as the case indicates the Baltimore and Ohio railroad was in sole charge of the train at the time the plaintiff was ejected. The legal position of the Central railroad was similar to that of the Pennsylvania Railroad Company in Pennsylvania R. R. Co. v. Jones, 155 U. S. 333, 15 Sup. Ct. Rep. 135, 39 L. ed. 176. There should have been a nonsuit as to the Central railroad.

It is assigned as error that the court allowed the jury to award damages for the indignity and consequent injury to his feelings. This is the settled law in case of an unlawful eviction: Allen v. Camden etc. Ferry Co., 46 N. J. L. 198; Delaware etc. R. R. Co. v. Walsh, 47 N. J. L. 548, 4 Atl. 323.

The case differs from the cases cited in the briefs for the plaintiffs in error. The present plaintiff had in his possession and showed the conductor a ticket which entitled him to be carried to Chester, and a timetable apparently authorized by the company which showed that the train was sched-

uled to stop at Chester. On the face of it he was entitled to be let off at Chester, and the reason for the decision in the cases cited growing out of the propriety of the conductor having evidence of the plaintiff's right is wanting in the present case.

The judgment, however, is a joint judgment and indivisible, and since it must be reversed as to the Central Railroad Company, it must be reversed in toto: Peterson v. Middlesex etc. Traction Co., 71 N. J. L. 296, 59 Atl. 456.

One Who, After Purchasing a Ticket for a designated station, is ejected from the train because, by the rules of the carrier, it does not stop at such station, may recover damages for his ejection: Kansas City etc. R. R. Co. v. Little, 66 Kan. 378, 97 Am. St. Rep. 376. See, also, Illinois Cent. R. R. Co. v. Harris, 81 Miss. 208, 95 Am. St. Rep. 466; St. Louis etc. Ry. Co. v. Harper, 69 Ark. 186, 86 Am. St. Rep. 190; note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 83.

The Liability of an Initial Carrier for the torts or negligence of connecting lines is the subject of a monographic note to Pennsylvania Co. v. Loftis, 106 Am. St. Rep. 604-612.

CITY OF PASSAIC v. PATERSON BILL POSTING, ADVERTISING AND SIGN PAINTING COMPANY.

[72 N. J. L. 285, 62 Atl. 267.]

CONSTITUTIONAL LAW—Billboard Ordinance.—A city ordinance limiting the height of signs and billboards to eight feet, and requiring them to be constructed not less than ten feet from the street line, is a regulation not reasonably necessary to the public safety and not justifiable as an exercise of the police power. (pp. 679, 680.)

William B. Gourley, for the plaintiff in error.

James Sullivan, for the defendant in error.

285 SWAYZE, J. The plaintiff in error was convicted of the violation of an ordinance of the city of Passaic regulating signs or billboards, and the conviction was affirmed by the supreme court: 71 N. J. L. 75, 58 Atl. 343.

The ordinance provides that no sign or billboard shall be at any point more than eight feet above the surface of the ground, and requires that it shall be constructed not less than ten feet from the street line.

The statutory authority for this ordinance is the act of April 8, 1903 (Pamph. Laws, p. 513), which authorizes the

governing body of any city to regulate the size, height, location, position and material of all fences, signs, billboards and advertisements. The statute does not limit the power of the municipal authorities to cases where the structures may be in a condition dangerous to the public safety, and the first section of the ordinance absolutely prohibits signs and billboards within ten feet of the street line. In the present case the billboard was erected in 1902, prior to [286] the passage of the act, and the police justice has certified that no evidence was offered of its being dangerous to life or limb because of insecure fastening.

It is obvious that the effect of the ordinance is to deprive the land owner of the ordinary use for a lawful business purpose of a portion of his land. Such deprivation is a taking within the meaning of the constitutional provision (Trenton Water Power Co. v. Raff, 36 N. J. L. 335, approved by this court in Pennsylvania R. R. Co. v. Angel, 41 N. J. L. 316, 56 Am. Rep. 1, 7 Atl. 432), and where no compensation is given to the land owner the taking can only be justified if it is done in the exercise of the police power of the state.

Upon this question the legal rule is accurately stated in the opinion of the supreme court in this case, as follows: "The true rule to be extracted from the cases, and the one abundantly supported by them, is that when statutes are obviously intended to provide for the public safety, and the ordinances prescribed under them are reasonable and in compliance with their purposes, both the statutes and the ordinances are lawful and must be given due effect. When the control attempted to be exercised over private rights is in excess of that essential to effectuate such legitimate authority, it deprives the owner of his property by circumscribing the use of it, without giving him the just compensation secured to him in such case by the organic law."

The supreme court held that because the erection of such signs might be attended with danger to the public at times of severe storms, or by the decay of their supports, the ordinance was not without legal authority.

In our opinion the legality of the ordinance does not depend upon the possibility of danger thus suggested, but upon whether such a regulation is reasonably necessary for the public safety. There must always be a possibility of danger from the erection of any structure and from its decay, but

such a possibility is not sufficient to justify the municipal authorities in depriving a man of the ordinary use of his land. In all our cities and towns fences and buildings are erected upon the street line, involving the same or even [287] greater possibility of danger from severe storms or natural decay, but it would hardly be maintained that a municipality could be authorized by the legislature to compel the owners of buildings already erected to take them down or move them back ten feet from the street line. Yet the danger to the public from bricks or slates, ice and snow, falling from a building is much greater than any possible danger from a billboard. In determining whether a regulation is reasonably necessary to secure the public safety, and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like billboards should be set back from the line. The very fact that this ordinance is directed against signs and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage. It is obvious from the face of the ordinance that the object of the first section was not to secure the public safety; that section contains no reference to a dangerous condition of billboards, while the second section expressly undertakes to deal with those that become dangerous.

We think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment of section 1 of the ordinance was due rather to æsthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

In two similar cases the courts of other states have reached the same result: Crawford v. City of Topeka, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476, 20 L. R. A. 692; Commonwealth v. Boston Advertising Co., 188 Mass. 348, 108 Am. St. Rep. 494, 74 N. E. 601, 69 L. R. A. 817.

The view taken by the majority of the appellate division [288] in New York is to the same effect: People v. Green, 88 App. Div. 400, 83 N. Y. Supp. 460.

In Missouri it was held that the owners of property along a boulevard could not be restricted from building within forty feet of the street (St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226), and in Maryland it was held that an ordinance of Baltimore forbidding the grant of a building permit unless in the judgment of the municipal board the size, general character and appearance of the building would conform to the general character of the buildings previously erected in the same locality, was invalid. The proposed building in that case was for the purpose of showing wild animals, and in reality conducting a continuous circus performance upon one of the most beautiful streets in Baltimore: Bostock v. Sams, 95 Md. 400, 93 Am. St. Rep. 394, 52 Atl. 665.

The case differs from Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81. The statute in that case gave a right of action in tort to an adjoining owner where a fence unnecessarily exceeding six feet in height was maliciously erected and maintained. Two elements were necessary for the right of action—the unnecessary character of the fence and the malicious motive—and the court held that not only must the motive be malicious, but that the malevolence must be the dominant motive. Such a statute does not deprive the land owner of any ordinary or beneficial use of his property. It merely prevents him from using it to injure his neighbors without benefit to himself.

In City of Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673, the ordinance under consideration went no further than to require the permission of the common council for the erection of a billboard more than six feet in height, and that permission could only be given after notice to owners and occupants of land within two hundred feet. The ordinance did not authorize the council to regulate the location and position of the billboard, and we must assume that in granting or withholding the permission the council would act judicially and solely with reference to considerations of the safety, health or morals of the public. The court said: "We think this statute conferred upon the common council of the city [289] authority to regulate boards

erected for the purpose of bill posting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city or persons passing along its streets." The invalidity of the ordinance in the present case, in our opinion, lies in the fact that it exceeds that necessity.

Since the effect of the ordinance is to take private property without compensation, and cannot be justified as an exercise of the police power, it is invalid.

The judgment of the supreme court should be reversed and a judgment entered reversing the conviction.

For Authorities upon the question involved in the principal case, see Commonwealth v. Boston Advertising Co., 188 Mass. 348, 108 Am. St. Rep. 494; Bryan v. Chester, 212 Pa. St. 259, 108 Am. St. Rep. 870; Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 659; Crawford v. Topeka, 51 Kan. 756, 37 Am. St. Rep. 323.

DOUGHTEN v. CITY OF CAMDEN.

[72 N. J. L. 451, 63 Atl. 170.]

MUNICIPAL CORPORATIONS—Water-pipes—Police Power. A water-pipe under the roadbed of a public street is not an appendage to or a part of the abutting land, and the owner of the property cannot be required, by a police regulation, to lay such pipe. (p. 685.)

MUNICIPAL CORPORATIONS—Assessment for Water-pipes. The imposition upon abutting property of a specified sum per front foot for the expense of laying water-pipes in the street by a city cannot be supported under the power of general taxation, nor under the power to tax property benefited by a public improvement because of the benefits but not in excess thereof. (p. 685.)

MUNICIPAL CORPORATIONS—Assessment for Improvements. An arbitrary assessment for local public improvements, not based upon or limited to benefits conferred, is invalid. (pp. 685, 686.)

Herbert A. Drake, for the plaintiff in error.

Edwin G. C. Bleakley, for the defendants in error.

452 MAGIE, C. The judgment of the supreme court now under review affirmed an imposition upon lands of the plaintiff in error for which no better name was found in the court below, or has been discovered by me, than "assessment." The imposition was at the rate of seventy-five cents a running front foot of the lands of plaintiff in error, adjoining the street in which the city of Camden had laid a pipe for

the conveyance of water. The pipe in question had been laid under the power conferred on the city of Camden to lay and relay water-pipes under the streets of that city, conferred by the provisions of an act entitled "An act to enable the city of Camden to supply the citizens thereof, and the inhabitants of the town of Pavonia, in the township of Stockton, with water," approved March 9, 1871: Pamph. Laws, p. 415.

By the fourth section of that act it was enacted that whenever the city council caused a water-pipe to be laid in any street of the city the owners of ground in front whereof the pipe should be laid should pay for the expense thereof seventy-five cents for each foot of their ground upon such street, and it was further provided that when a pipe should be thus laid the city council should cause a statement of such expense to be filed with its city clerk, and such expense should be and remain a lien upon the ground, from the day of performing the work until it was paid and satisfied.

The assessment, and the proceedings which led to it, were brought into the supreme court by a certiorari, sued out by the plaintiff in error, a property owner, and various objections to its validity were there presented by the reasons filed under our practice. It appeared in the case that the pipe in question was laid by the city of Camden to take the place of a pipe previously laid in the street and used for furnishing water. The previous pipe had been laid by a waterworks company, having legislative authority, and by like authority the city of Camden had purchased the plant and property of that company. The pipe in question was laid to replace that [453] previously in the street, on the claim that the latter had become unfit for use. Upon these facts the prosecutor claimed that the assessment on him could not be supported, because the expense incurred by the city was not for laying, but for relaying, water-pipes. He further claimed that no authority to lay the pipe in question had been given by the proper officials of the city. Both these objections were held by the supreme court to be insufficient, upon grounds which are entirely satisfactory to us, and no error is found in this respect.

A question of vital importance in the cause was raised by a reason which challenges the constitutional power of the legislature to authorize a municipality to impose upon lands

abutting on a public street in which such a water-pipe is laid a fixed or specified amount of the expense thereof. The learned justice who pronounced the opinion of the supreme court found such power to exist, and thereupon the assessment was confirmed. The correctness of that conclusion is here questioned.

The case shows that the city of Camden, since it purchased the plant and property of the waterworks company, has made use thereof, not only to provide water for strictly public purposes, but also to furnish to its inhabitants water for compensation, and that the net receipts therefrom exceed the expense. In this respect the acquisition and maintenance of the plant and property is a business venture of the municipality. For the cost of acquiring and maintaining the same, doubtless resort could be had to the power of general taxation.

It has not been contended that the imposition under review can be supported upon the general power to lay taxes. If the legislative grant of power to impose an arbitrary amount upon abutting land for the expense of laying a water-pipe in the street could have ever been held to be constitutional, it ceased to be such after the adoption of paragraph 12, section 7 of article 4 of the amendments to our constitution, which provides that "property shall be assessed for taxes under general laws and uniform rules, according to its true value." Immediately upon the adoption of that amendment [454] it operated to abrogate all special laws assessing property for taxation: North Ward Nat. Bank v. City of Newark, 39 N. J. L. 380, 40 N. J. L. 558; Trustees v. City of Trenton, 30 N. J. Eq. 667.

When, under pre-existing legislation, authority for an imposition of a sum fixed by a municipal board on vacant lots, and lots with buildings thereon in which water was not taken, if such lots were on a street in which water-pipes were laid, was pronounced invalid in this court, Mr. Justice Depue declared that under that constitutional provision no tax could be lawfully laid on property which is not determined either by special benefits derived or by a valuation of the property upon a uniform rule at its true value. And he held that a sum imposed at the discretion of a municipal board, without regard to valuation, was prohibited: Jersey City v. State, 43 N. J. L. 638. Nor will the case be different if the specified imposition is a sum fixed by the legislative act. The amend-

ment was held, in the case last cited, to have repealed inconsistent provisions in the charter of Jersey City. It will operate to render invalid all subsequent attempts at arbitrary exactions under the guise of general taxation.

Nor can the assessment under review be sustained as falling within that class of taxes which are imposed upon lands for the expense of public improvements by reason of the peculiar benefits thereby conferred upon such lands.

Since the decisions of Tidewater Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634, and of Agens v. City of Newark, 37 N. J. L. 415, it has been settled law in this state that the cost of local public improvements may be imposed under the power to tax upon lands peculiarly benefited thereby, but only to the extent of the benefits so conferred. Legislation intended to confer power to impose such tax on lands, to be valid, must not only limit the power to lands peculiarly benefited, but must expressly, or by necessary implication, limit the imposition to the amount of the peculiar benefits conferred. The cases in which this doctrine has been applied are too numerous and well known to require citation.

The act under which the assessment under review was made does not impose this charge upon the property along the line [455] of the street by reason of any benefit conferred thereon by the pipe laid, or if it be inferred that such was the legislative intent, the act is not within the rule, because the imposition is not to be fixed and determined by benefits, nor to be limited to benefits, but is a mere arbitrary imposition without reference to benefits.

The court below recognized that the assessment before it could not be supported as one imposed by reason of benefits conferred, but found a ground upon which it was concluded it could be supported as valid. The learned justice who delivered the opinion in that court declared that there was a distinction between improvements primarily for the public welfare and only incidentally for the benefit of the land owner, and those of which the converse is true. With respect to the first class, he held that the rule respecting imposition by reason of benefits must be rigidly applied, while with respect to the second class he held that the rule was not imperative and that the cost could be charged on the property to which the chief advantages accrues, even though the benefit be not an exact equivalent. He found the distinction illustrated and applied in the cases in the supreme court which

had held that the whole cost of laying a sidewalk, a curb and gutter, and of connecting abutting property to a sewer in the street, might be validly imposed on the adjoining lands.

The first of the cases referred to was Sigler v. Fuller, 34 N. J. L. 227, in which the supreme court affirmed the imposition, under legislative authority, of two-sixths of the cost of a sidewalk upon the owners of land in front of which it was laid and of one-sixth of such cost upon the owners of land on the opposite side of the street, apportioned by the number of lineal feet owned. That court did not consider that such an assessment was obnoxious to the doctrines declared in the Tide Water case (18 N. J. Eq. 578, 90 Am. Dec. 634) by the court of errors. In the subsequent case of Agens v. Newark, 37 N. J. L. 415, Chief Justice Beasley, speaking for the court of errors, took occasion to declare that the case of Sigler v. Fuller, 34 N. J. L. 227, was not in harmony with the doctrine of the Tide Water case, which he was applying to the case in hand. But he pointed out that there was a substantial distinction [456] between improvements in the roadbeds of streets and improvements of sidewalks. He declared that a sidewalk had always been regarded, under our laws and usages, as an appendage to and part of the adjoining premises so essential to their use as to make its improvement a burden belonging to the ownership of the premises and the order for such improvement a police regulation. Upon this view he evidently thought the imposition of two-sixths of the cost of a sidewalk could be imposed upon the adjoining lands. But he expressly declared that the imposition of part of such cost upon owners of land on the opposite side of the street was indefensible, because it was a burden imposed irrespective of benefits.

This criticism upon the case of Sigler v. Fuller, 34 N. J. L. 227, though incidental and unnecessary to the opinion in which it was contained, has always been deemed by the supreme court to justify the imposition upon adjoining lands of the whole cost of the improvements of sidewalks: Van Tassel v. Jersey City, 37 N. J. L. 128; Kirkpatrick v. Commissioners, 42 N. J. L. 510. The doctrine was naturally extended to the cost of a curb and gutter necessary to be laid for the security of the sidewalk: Robins v. New Brunswick, 44 N. J. L. 116. More lately the supreme court has sustained an imposition upon lands, made under legislative authority, of the whole cost of constructing house connections from a

sewer in the street to the curb line in front of said lands: Van Wagoner v. City of Paterson, 67 N. J. L. 455, 51 Atl. 422. Obviously this imposition could not be supported on the theory that was deemed to support the other cases. The court found support in the right of local authorities, under our laws for the preservation of health, to compel the abutting owner to make connections with sewers at his own expense. The power exercised by the legislature to impose on abutting owners the whole cost of such connections was declared to be an incident of the police power of the state.

The assessment before us cannot, in my judgment, be supported by the sidewalk cases, if correctly decided. A water-pipe under the roadbed of a public street cannot be said to be an appendage to or a part of lands abutting on the street, and there could be no police regulation requiring a property owner to lay such a pipe.

457 Nor can I find any firmer support for the assessment in the doctrine of Van Wagoner v. City of Paterson, 67 N. J. L. 455, 51 Atl. 422. If an abutting owner may, in the interest of public health, be compelled, at his own expense, to connect his lands with a public sewer, and if such connection reasonably requires the use of running water, it may be that such owner could be compelled to lay, at his own expense, a service pipe from a water main in the street; but such a police regulation, while possibly justifying the imposition on such owner of the whole cost of the service pipe, can no more justify the imposition of the whole or any arbitrary part of the cost of the water main than would the power to compel sewer connections justify the imposition of the cost of the sewer in the street otherwise than upon lands benefited in proportion to and not in excess of benefits.

In my judgment, the imposition on the lands of plaintiff in error of a fixed amount of the cost of laying the water-pipe cannot be supported upon the grounds relied on in the court below, but falls within the principle settled in this state which makes invalid such an arbitrary assessment not based upon or limited to benefits conferred.

There are decisions of courts of repute inconsistent with the doctrines declared and enforced in this state. Under those decisions assessments for the cost of improvements in the roadbed of streets, such as pavements, water-pipes, sewers, etc., which arbitrarily impose the whole cost on abutting land

without reference to benefits, have been supported. The contrary doctrine has been so long and uniformly enunciated and applied in this state that I do not think it open for discussion.

The judgment of the supreme court affirming this assessment must be reversed, and the assessment must be vacated and set aside.

The Laying of Pipes for the Conveyance of Water along a particular street or streets is a local improvement which may be paid for by special assessment or special taxation: Hughes v. Momence, 163 Ill. 535; Hewe v. Glos, 170 Ill. 436; State v. Robert P. Lewis Co., 82 Minn. 390.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

FLYNN v. McDERMOTT.

[183 N. Y. 62, 75 N. E. 931.]

WILLS—Election of Widow—Personal Privilege.—The privilege of a widow to elect whether she will take under a will is purely personal, and does not pass to her legal representatives. (p. 689.)

ELECTION OF A WIDOW—Effect of Her Death Within the Year.—If a widow having the right to elect as between a legacy in her husband's will and her right to dower dies within the year in which she is entitled to exercise her election and without making it, the right to the legacy vests in her executor. (pp. 689, 690.)

WILL—Election of Widow—Effect of Contest of Will by Her. The commencement of a proceeding by a widow to contest her husband's will is not an election to take dower, if the will is set aside, or to take the devise or bequest under it if it is sustained. Her right of election remains in abeyance, and if she dies within the time in which she is entitled to make her election, the right to the legacy given to her by the will vests in her executor. (p. 690.)

Appeal from a judgment in favor of the executor of Mary M. McDermott in an action brought by him to recover a legacy bequeathed to her by her deceased husband.

Bertram L. Kraus and Henry B. Wesselman, for the appellant.

Thomas F. Magner, for the respondent.

64 BARTLETT, J. This is an action against the estate of John McDermott, deceased, brought by the executor of the widow, Mary M. McDermott, to recover a legacy in her favor under her husband's will. John McDermott died on the 18th of March, 1902, leaving a last will and testament, which was executed on June 19, 1900.

The third and fourth subdivisions of the will read as follows: "Third. I give, devise and bequeath to my beloved wife Mary M. McDermott, the sum of nine thousand dollars in cash, to be paid to her by my executor and trustee hereinafter named out of my estate within one year after my decease, with legal interest thereon, to be computed from the day of my death until such payment shall be made by my said executor and trustee to my said wife, Mary M. McDermott.

"Fourth. The above legacy of nine thousand dollars, and the one-half of said policy of insurance hereinbefore mentioned I hereby declare is given to my said wife in full satisfaction and for and in lieu of her dower or thirds which she can in anywise claim or demand, or which the statutes of the state of New York give to her and which she might in any way claim out of my estate."

The will of John McDermott was duly proved on the 26th of March, 1902. On the 12th of July, 1902, his widow, Mary M. McDermott, instituted an action in the supreme court to determine the validity of the probate of the will, which action was pending on the 11th of September, 1902, when said Mary M. McDermott died. The will of the widow was duly proved soon after her death. The death of the widow occurred within the statutory year allowed her for election to take the provisions of the will in lieu of dower, and without her having exercised the same.

Section 180 of the Real Property Law reads as follows: "If real property is devised to a woman, or a pecuniary or [65] other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provisions so made, or be endowed of the lands of her husband; but she is not entitled to both." It is provided in section 181, in substance, that where a woman is entitled to an election, she is deemed to have elected to take under the provisions of the will, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for the same. This presumption does not apply in the present case, as the widow died within the year. After the expiration of the year from the death of John McDermott, due demand having been made by the executor under the will of the widow for payment of her legacy, this action was commenced to enforce the same.

The claim of the defendant appears to be inconsistent with the allegations of his answer, stating that the widow had elected to take her dower, which position seems to have been abandoned, and the charge now is that the widow died within one year without having made an election. This latter contention is in accordance with the allegation of the complaint, and the questions in this case are: 1. What is the effect of the widow having died within the year making no election? 2. What is the effect of the widow having begun an action in her lifetime to set aside the will on the ground that the same was not executed according to law and that her husband was of unsound mind and incapable of making a will?

We are cited to no decision in this state passing directly upon the effect of a widow dying within the year allowed her for election. It has been frequently held in other states that this privilege of election is purely personal so far as the widow is concerned and does not pass to her legal representatives: Sherman v. Newton, 72 Mass. (6 Gray) 307; Crozier's Appeal, 90 Pa. St. 384, 35 Am. Rep. 666; Boone's Representatives v. Boone, 3 Har. & McH. (Md.) 95; Welch v. Anderson, 28 Mo. 293; Eltzroth v. Binford, 71 Ind. 455; Donald v. Portis, 42 Ala. 29.

66 We agree that this is a proper construction of the statute. The widow is given one year from her husband's death in which to make an election between the legacy given in lieu of dower and the enforcement of the dower right. The position taken by the appellant is that as the right of election is personal, and the widow having died without exercising it, she must be deemed to have abandoned her right to the legacy.

It has been held that a bequest in lieu of dower, and the acceptance of same, amounts to a matter of contract and purchase; that the wife is to be paid the bequest in preference to other legacies and without abatement, the debts being first paid: Isenhart v. Brown, 1 Edw. Ch. 411; Hathaway v. Hathaway, 37 Hun, 265.

The appellant argues, from this undoubted principle of law, that a legacy left in lieu of dower differs from an ordinary legacy and is purely personal to the widow as it is coupled with the statutory right of election vested in her, and the latter failing by reason of her death, the legacy falls with it. This construction is unreasonable and unwarranted. The

effect of the widow's death within the year is to vest the right to collect the legacy in her executor.

The second point presented is the effect of the widow's action in contesting her husband's will. We are of opinion that where a widow is left a legacy in lieu of dower, her right to attack the will for any legal reason still exists, and an action to contest its probate is not to be construed as an election to take dower if the will is set aside, or to take the devise or bequest under the will if it is sustained. In other words, her rights are in abeyance until the determination of the will contest. This position is directly recognized under the Real Property Law (section 181), which provides, in substance, that if, during the period of one year given the widow for election, it is made to appear to the court by affidavit, among other things, that an action is pending to contest the probate of the will, her time in which to make such election may be enlarged by order.

[67] It follows that the executor of the widow is entitled to collect the legacy due under the third subdivision of her husband's will, with interest from the date of his death.

The judgment and order appealed from should be affirmed, with costs.

Cullen, C. J., Gray, Haight, Vann and Werner, JJ., concur.

O'Brien, J., absent.

Judgment and order affirmed.

The Right of a Widow to Elect between her right of dower and her rights under her husband's will is usually regarded as a strictly personal right which cannot be exercised after her death by her representatives: Crozier's Appeal, 90 Pa. St. 384, 35 Am. Rep. 666. Though a widow executes and acknowledges in the form prescribed by statute, and files in the proper office her election to take one-half of her childless husband's estate in lieu of dower, yet if such election is not filed in the recorder's office in her lifetime, it is wholly inoperative, and cannot become operative by being filed by her attorney after her death: Wash v. Wash, 189 Mo. 352, 107 Am. St. Rep. 353, and see the cases cited in the cross-reference note thereto.

KUELLING v. LEAN MANUFACTURING COMPANY.

[183 N. Y. 78, 75 N. E. 1098.]

FRAUD OR DECEIT, with Damage, is a Good Cause of Action. (p. 694.)

FRAUD OR DECEIT, Right of Third Person to Recover for.—The right to recover for fraud or deceit is not restricted to the parties to the transaction, but extends to third persons injured thereby. (pp. 694, 696.)

MANUFACTURES — Liability to Third Persons Injured by Fraudulently Concealed Defects.—If they who manufacture a farm roller for the purpose of sale intentionally put in a tongue which is unfit for the purpose, because it is made of cross-grained timber and has a knot in it and also a large knot hole, and conceal this hole by a plug of wood nailed in, and then cover up the knot, the hole, and the cross-grain of the wood with putty and paint, so that these defects cannot be seen, they are liable to a third person who purchases the roller of their vendees and is injured by its breaking when in use, through these defects. (p. 698.)

VENDOR OF ARTICLES Damaged Because of Known Defects, Liability of.—One who sells an article knowing it to be dangerous by reason of a concealed defect is guilty of a wrong without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers injury by reason of his willful and fraudulent deceit and concealment. (p. 699.)

Charles Van Voorhis, for the appellant.

Cogswell Bentley and S. D. Bentley, for the respondent.

81 BARTLETT, J. This action has been twice tried. The first trial resulted in a verdict for the plaintiff in the sum of three thousand and forty dollars; the judgment entered on this verdict was reversed and a new trial ordered. The second trial resulted in a nonsuit, the trial judge ordering the plaintiff's exceptions to be heard in the first instance by the appellate division; the latter court overruled the exceptions, denied motion for a new trial and ordered judgment for the defendant upon the nonsuit. The appellate division wrote no opinion, but rested its decision on the opinion of McLennan, P. J., handed down on the first appeal: 88 App. Div. 309.

The plaintiff is a farmer, residing in East Penfield, Monroe county, in this state; the defendant is a foreign corporation organized under the laws of the state of Ohio, and engaged in the manufacture and sale of farming implements, its manufactory being located at Mansfield, in that state.

A few weeks prior to April, 1902, the defendant sold to the firm of Weaver, Palmer & Richmond, who were engaged

in the business of selling agricultural implements in the city of Rochester, a certain road roller, with a tongue to which was attached a team of horses when in use. A few days after this sale the purchasers sold the roller to the firm of Fuller & Barnhart, dealers in agricultural implements at Fairport, Monroe county, in this state. In April, 1902, the plaintiff purchased the road roller of the firm of Fuller & Barnhart, used it a short time in the spring on his farm, stored it in a covered shed until about the first day of the following September, when he had occasion to use it again in the conduct of his ordinary farm work, and while so engaged with two horses attached thereto, the tongue broke, precipitating him from a seat which was attached to the rear end of the tongue immediately over the roller, causing the horses to run away. Plaintiff clung to the reins for a short distance, was compelled to release his hold and the roller, weighing some seven hundred pounds, passed over him, inflicting severe injuries.

This action was brought by the plaintiff against the defendant as the manufacturer of this roller, and is based upon the [82] allegation that in constructing it the defendant "intentionally, willfully, maliciously, negligently and fraudulently" put into it a tongue made of cross-grained black or red oak which was unfit for that purpose; that the tongue had a knot in it, and in addition a large knothole just in front of the point at which the evener and whiffletrees were attached; that the defendant concealed this knothole with a plug of soft wood nailed in, and then the knot, the plug, the hole, the cross-grain of the wood and the kind of wood used were covered up and concealed by the defendant with putty and paint so that the defects could not be seen by inspection; that the tongue was placed in the roller so that the knot and plug were on the underside; that the roller, by reason of these defects, was dangerous to the life and limbs of any person who should use it, and that the defects aforesaid made the tongue so weak that it broke as before stated at the time of plaintiff's injury and was the cause thereof.

A rather unusual state of affairs is presented in the history of this litigation. This action is based upon the allegation that the defendant "intentionally, willfully, maliciously, negligently and fraudulently" placed in this roller a tongue containing certain defects and concealing the same, as stated. It appears, however, that at the first trial the case was tried upon the theory of negligence and the jury passed upon no other

question. The jury rendered a verdict for the plaintiff in the sum of three thousand and forty dollars. The appellate division, on reviewing the judgment entered upon this verdict, stated in its opinion written by McLennan, P. J., as follows: "The case was submitted to the jury purely and simply as an action for negligence. While in the complaint it was alleged that the defendant 'willfully, maliciously, negligently and fraudulently' put the defective tongue into the roller in question, intending that such implement should be sold in the open market, and concealed such defect, knowing that when used it would break and probably occasion injury to the person using it, that question was not left to the jury for determination. The learned trial court charged the jury in substance that no contractual [83] relation or privity existed between the plaintiff and the defendant; that 'the basis of the action is negligence,' and that in order to recover the plaintiff was only required to establish by a fair preponderance of evidence, that the accident was caused through the negligence of the defendant and without negligence on the part of the plaintiff. The court also charged that in order to establish defendant's negligence and entitle the plaintiff to recover it was necessary for the jury to be satisfied upon the evidence that the land roller in question, with the defective tongue, was a machine or implement imminently dangerous to human life, but charged, as matter of law, that a land roller was not intrinsically thus dangerous, but was an implement in ordinary and every-day use and of simple construction. The jury determined each of the questions submitted in favor of the plaintiff."

The learned judge in his able opinion dealt only with the issue of negligence submitted to the jury. On the present appeal the counsel for the appellant presents what we deem the controlling question, the willful and fraudulent act of the defendant as alleged in the complaint. We will assume for the purposes of this case that this roller was not a machine imminently dangerous and likely to injure any person using it.

We express no opinion as to the liability of the manufacturer or seller of a machine or vehicle to third parties in case of negligence, in the absence of fraud or deceit, whether the machine or vehicle be in its original state imminently dangerous to human life or made so by the subsequent act of the manufacturer or seller. The case at bar, in the view we take of it, does not involve the law of negligence, but is controlled

by considerations resting upon the law applicable to willful and fraudulent deceit and concealment.

In England the court of king's bench in 1789 in the case of Pasley v. Freeman, 3 Durn. & E. 51, held that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should [84] be benefited by the deceit or that he should collude with the person who is.

In Upton v. Vail, 6 Johns. 181, 5 Am. Dec. 210, Chief Justice Kent, in commenting upon the case cited, said: "I have carefully examined the reasoning of the judges in that case and in the subsequent cases which go to question or support the soundness of that decision, and I profess my approbation of the doctrine on which it was decided. The case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." We have here the recognition of the general principle upon which this and similar actions must rest, to wit, that fraud or deceit with damage is a good cause of action.

In many of the cases presented to the courts under this principle of law the litigation is confined to the original parties concerned in the transaction. In the case before us we have a third party seeking damages by reason of the willful and fraudulent act of the defendant. The right of recovery under conditions similar to those now presented is established in this and other jurisdictions.

In this state the principle is fully recognized in Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376. This was an action brought by one who purchased notes issued by the Iron Mountains Company of Lake Champlain, a corporation, against its directors for alleged fraud and conspiracy to induce the public, by means of false representations as to its financial condition, to purchase its stock and paper. This court held that there was no evidence that the purchaser in making the purchase relied upon any representations made by defendant, but on the contrary it affirmatively appeared that he was at the time wholly ignorant of the alleged fraudulent scheme or of

any acts or representations of the defendant or other parties to the alleged conspiracy.

Judge Andrews, writing the opinion for the court, said:
85 "This cause of action was substantially one for fraud and deceit by means of false pretenses, and the right of recovery is governed by the principles applicable to actions of that character. That this is the nature of the action was decided in the case of Arthur v. Griswold, 55 N. Y. 400, which was also an action against the present defendant and others, the complaint in which set forth a cause of action similar to that alleged in the third count of the complaint in this action. The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. The gravamen is fraud and damage and not the conspiracy. The means by which a fraud is accomplished are immaterial except so far as they tend, in connection with the damage suffered, to show an actionable injury. The question in this case turns upon the point whether the evidence proved or tended to prove a cause of action against the defendant for false and fraudulent representations within the rules governing the common-law action for fraud and deceit. There is no doubt or question as to what elements are requisite to sustain an action for false pretenses. The essential constituents of such an action have been understood from the time such actions were first maintained. They are tersely stated by Church, C. J., in Arthur v. Griswold, 55 N. Y. 400, viz.: 'Representation, falsity, scienter, deception and injury.' There must have been a false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he, in good faith, parted with property or incurred the obligation which occasioned the injury of which he complains. All of these circumstances must be found to exist, and the absence of any of them is fatal to a recovery. It is not necessary that the false representation should have been made by the defendant personally. If he authorized and caused it to be made it is the same as though he made it himself. Nor is it necessary that it should have been made directly to the plaintiff. If it was made to the public at large for the purpose of influencing the action of any individual who may act
86 upon it, any person so acting upon it and sustaining injury thereby may maintain an action. In order to recover

in an action for fraud and deceit the fraud and injury must be connected. The one must bear to the other the relation of cause and effect, not, perhaps, in so close a sequence as in actions on contract. But, nevertheless, it must appear in an appreciable sense that the damage flowed from the fraud as the proximate and not the remote cause. The case of Peek v. Burney, L. R. 6 H. L. 377, applies with great stringency the rule that to sustain an action for fraudulent representations, a close relation must be shown between representations and the injury claimed, and, also, that the representations must have been made to influence the conduct of the plaintiff or of a class of persons in which he was included." In this case the plaintiff succeeded below, but the judgment was reversed in this court for the reason that he failed to bring himself within the rule as stated. The proof failed but the principle was fully recognized.

While the case just cited is one of false representations, it involves the precise principle invoked in the case before us. The charge is that the defendant and others made false and fraudulent representations that induced this plaintiff, as one of the general public, to purchase its stock and paper. In other words, it holds that a person guilty of the fraud is liable even to third parties if they have relied and acted upon it. In the case cited we have the charge of affirmative false representations. In the case at bar we have not only fraudulent deceit and concealment, but what amounts to an affirmative representation that the tongue of the roller was sound, as the manufacturer by filling the defect with putty and painting the entire surface so that the eye could not detect any weakness by reason of the knot, knothole filled up, the kind of wood employed and the fact that it was cross-grained, must be held to have represented that the roller as offered for sale was in a perfectly marketable condition.

In Heizer v. Kingsland etc. Mfg. Co., 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630, 15 L. R. A. 821, it was held by the supreme court of Missouri that the [87] explosion of the cylinder of a threshing machine, by which a person engaged in operating it was injured, will not render the manufacturer liable in the absence of any privity of contract between them, unless the manufacturer knew the machine was defective, although he was guilty of negligence in manufacturing and testing the machine. Black, J., writing for the court, said: "The

distinction between negligence and intentional wrong is important in tracing down liability for the consequences arising therefrom. This distinction is pointed out with clearness in an article in 16 American and English Encyclopedia of Law, pages 392 and 434. Had the defendant sold this machine to Ellis, knowing that the cylinder was defective, and for that reason dangerous, without informing him of the defect, then the defendant would be liable even to third persons, not themselves in fault. As said in Wellington v. Downer Kerosene Oil Co., 104 Mass. 64: 'It is well settled that a man who delivers an article which he knows to be dangerous or noxious to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself in fault.' " The learned judge then stated in substance that the defendant, in the case under consideration, was not proved to have any knowledge of the dangerous condition of the cylinder, and that the plaintiff's case tended to show nothing more than negligence.

In the case of Wellington v. Downer Kerosene Oil Co., 104 Mass. 64, it was held that a declaration that the Downer Kerosene Oil Company, knowing one Chase to be retailer of fluids to be burned in lamps for illuminating purposes, and naphtha to be explosive and dangerous to life for such a use, sold and delivered naphtha to him, knowing that it was his intention to retail it in his business; that in ignorance of its dangerous properties he retailed a pint of it to the plaintiff Wellington to be burned in his lamp for illumination, and that while the plaintiff, in like ignorance, was so burning it, it exploded and 88 injured him and his property, sets forth a good cause of action at common law.

In Lechman v. Hooper, 52 N. J. L. 253, 19 Atl. 215, the defendant, a mason, had erected a building as a contractor, and one wall was in a dangerous condition; the defendant had full knowledge of the fact. The plaintiff, who had entered the building engaged in another branch of work entirely distinct from that of the mason, was injured by a portion of the wall falling upon him. The defendant was held liable. Chief Justice Beasley said, in the course of his opinion: "The defendant had erected this wall, and, therefore, the law imposed on him the duty to put it in a safe condition, or to give warn-

ing of its unsafe condition, and this was a duty he owed to each individual person who should lawfully come upon the premises."

In Lewis v. Terry, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 220, 31 L. R. A. 220, the defendant was sought to be charged for having placed upon the market a folding-bed that was so imperfectly constructed, a fact well known to the defendant, that at times when any weight was placed on the bed the heavy upright frame would be precipitated with such force upon the lower portion as to wound and even kill a person lying thereon. The defendant was held liable, and the court said that the fact "that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe when known to be really unsafe, for the danger is thus rendered more insidious."

In Woodward v. Miller, 119 Ga. 618, 100 Am. St. Rep. 188, 46 S. E. 847, 64 L. R. A. 932, the supreme court of Georgia dealt with this same question as late as March, 1904. The headnote reads: "The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of its employés, representing it to be strong and in good condition, but knowing that it is in fact defective, the defect being so concealed by the use of paint and grease that the purchaser cannot detect it, is liable in damages to the person whose use of the buggy was contemplated at the time of the sale, for injuries caused by such defect; and this is so notwithstanding there was no privity of [89] contract between the plaintiff and the defendant in the sale of the buggy."

In Derry v. Flitner, 118 Mass. 131, Morton, J., said (page 133): "The rule is well settled and is constantly applied in this commonwealth, that one who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury: Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Metallic Compression Casting Co. v. Fitchburg R. R. Co., 109 Mass. 277, 12 Am. Rep. 689; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Carter v. Towne, 98 Mass. 567, 96

Am. Dec. 682; McDonald v. Snelling, 14 Allen (96 Mass.) 290, 92 Am. Dec. 768."

The cases establish the legal principle that one who sells an article knowing it to be dangerous by reason of concealed defects is guilty of a wrong, without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers an injury by reason of his willful and fraudulent deceit and concealment.

The judgment of the trial court and of the appellate division should be reversed and a new trial ordered, with costs to the plaintiff in all the courts, to abide the event.

VANN, J. One who carelessly labels a deadly poison as a harmless medicine and puts it on the market in that condition is liable to any person who without notice of its dangerous character uses the same to his injury: Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. The manufacturer of a machine not inherently dangerous to human life, but with a defect therein which he pointed out to one who purchased it for his own use and at his request attempted to remedy the defect and then painted it over, is not liable to one who was injured while [90] using the same with the consent of the purchaser: Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 513.

The first case is typical of those which permit the user of a machine, appliance or article that is inherently dangerous to recover damages from the maker for injuries sustained without notice, and the second of those which deny relief when the machine is not inherently dangerous to human life.

We now have a case before us with a new element, that of deceit on the part of the manufacturer, who intentionally so concealed a defect in a machine not intrinsically dangerous as to thereby make it dangerous and without notice sold it to one who, as he knew, intended to sell it to any purchaser he could find. The deceit, as the jury might have found, consisted in the complete concealment of a defect, not necessarily dangerous if unconcealed but dangerous when concealed, and putting the implement in this condition on the market, without notice to anyone, with the intention that it should be sold and used as a safe implement. The natural result of this conduct was to injure whoever might use the implement, whether he was the original purchaser, or any subsequent purchaser, or one who simply used it with the consent of the owner.

A manufacturer has the right to sell a defective machine, if he gives notice of the defect to the purchaser, who in turn has the same right. Neither has the right, however, with furtive intent, to completely conceal the defect and sell the machine as sound and safe, intending it to be used as such by anyone into whose possession it might lawfully come, when the natural result would be the infliction of an injury upon any person who used it. By giving currency to the implement as safe, with the intent to deceive not only the purchaser but any user, and yet so covering up the defect as to entirely conceal it, the defendant was guilty of an actionable wrong, as the jury might have found. While the machine was not inherently dangerous, that fact is not controlling, for the danger was in the concealed defect in an implement sold as sound, and which not only appeared to be sound, but the [91] maker caused it to so appear with intent to deceive. It would be illogical to hold the maker of a poisonous medicine, who negligently but unintentionally labeled it as an innocent remedy and sold it, liable to anyone who used it without notice of its character, but not to hold him liable if he intentionally created a danger in a machine apparently safe, which might be as fatal as poison, and, after concealing it in such a way as to prevent detection, put it on the market. While the danger in the one case is not so great as in the other, still if the natural result would cause bodily harm to a human being, that regard for the safety of life and limb which the common law is so careful to shield should hold the wrongdoer liable in both. A land roller is an implement not ordinarily dangerous, but one with a defective tongue, when the defect is thoroughly concealed for the purpose of making a better sale, may turn out to be as dangerous as a cartridge loaded with dynamite instead of gunpowder. Liability in this case rests on the simple extension of the well-established principle that the maker of an article inherently dangerous but apparently safe, who puts it on the market without notice, is liable to one injured while using it, to the maker of an article, not inherently dangerous, who made it dangerous by his own act but so concealed the danger that it could not be discovered and put it on the market to be sold and used as safe. The extension is logical and consistent with the authorities, for if the implement is not inherently dangerous, but the use thereof is made dangerous by a defect wrongfully concealed, the result is the same and the motive worse. I concur for reversal.

Cullen, C. J., Haight and Werner, JJ., concur, and Gray, J., concurs with Bartlett, J., only.

O'Brien, J., absent.

Judgment reversed, etc.

MANUFACTURER'S LIABILITY TO THIRD PERSONS.

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I. Scope of Note.

Inasmuch as the phase of the subject of this note, in so far as the liability of the manufacturer is sought to be sustained upon the ground of negligence, has been exhaustively considered in the recent monographic note attached to Woodward v. Miller, 100 Am. St. Rep. 192, we shall in this note confine ourselves to the question of his liability based upon his alleged fraud or deceit in the manufacture of the articles causing the injury. For other phases of the general subject see the note on false representations attached to Cottrill v. Krism, 18 Am. St. Rep. 555; the note on misrepresentations indirectly made to the complaining party, attached to Henry v. Dennis, 85 Am. St. Rep. 368; the note on contracts for the benefit of a third party which he may sue upon, attached to Baxter v. Camp, 71 Am. St. Rep. 176; and the note upon the general liability of druggists and apothecaries, attached to Howes v. Rose, 55 Am. St. Rep. 255.

II. General Rule as to Liability of Manufacturer as Dependent upon the Doctrine of Negligence.

Ordinarily, an action of negligence does not lie unless the defendant was under some duty to the injured party at the time and place where the injury occurred which he has omitted to perform: Daugherty v. Herzog, 145 Ind. 255, 57 Am. St. Rep. 204, 44 N. E. 457, 32 L. R. A.

837. In this connection Lord Esher, the master of the rolls, observed that: "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases toward the whole world if he owes no duty to them": Le Lievre v. Gould, [1893] 1 Q. B. 491. But it was also observed in another English case, which is cited in most of the cases involving the liability of manufacturers toward third persons, that "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger": Heaven v. Pender, L. R. 11 Q. B. D. 503.

The cases involving the liability of a manufacturer to third persons generally fall into two classes, namely, those in which the injury complained of arose through the negligence of the manufacturer in the manufacture or sale of an imminently dangerous article, such as the sale of poisonous drugs under a harmless label, and those in which the manufacturer, actually knowing of dangerous qualities in the article put upon the market, fraudulently conceals the dangerous defects and represents the article to be safe, notwithstanding his knowledge to the contrary: McCaffrey v. Mossberg etc. Mfg. Co., 23 R. I. 381, 91 Am. St. Rep. 637, 50 Atl. 651, 55 L. R. A. 822.

III. Distinction Between Ordinary Negligence and Negligence Which is Imminently Dangerous to Life.

"There is," said the court in Burke v. De Castro, 11 Hun, 354, "a well-recognized distinction in the law between an act of negligence which is imminently dangerous to the lives of others and one that is not so. In the former case, the guilty party is liable to any person who sustains an injury by the act, whether there exists any privity between them or not, while in the latter case the negligent party is liable only to the party with whom he contracted, on the ground that his negligence constitutes a breach of the contract.

"The defendant cannot be made liable under the first part of the rule here stated, because it cannot be said that the act of which he was guilty was imminently dangerous to the lives of others. Acts within that meaning are, where the owner of a loaded gun puts it in the hands of a child of indiscretion: Dixon v. Bell, 5 Maule & S. 198; and where a dealer in drugs carelessly labels a deadly poison as a harmless medicine and sends it so labeled into the market: Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. In both of these cases the party is liable to any person who sustains damages from the carelessness, for the reason that death or great bodily harm is almost certain to ensue therefrom. The negligence of this defendant, how-

ever, was not of this character, and does not fall within this rule. It was neither natural nor certain that injury or death would result therefrom, and only imposed a liability in cases where a duty or obligation arose from the relation of the parties; but the plaintiff and defendant sustained no such relation."

IV. Distinction Between Contractual Duty and the Duty Arising Outside of Contractual Relations.

"The general rule of law," said the court in Marvin Safe Co. v. Ward, 46 N. J. L. 19, "is that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract: Alton v. Midland R. R. Co., 19 Com. B., N. S., 213. The leading case on this subject is Levy v. Langridge [Langridge v. Levy], 2 Mees. & W. 519, 4 Mees. & W. 337. There a stranger to the contract was allowed to sue, but the decision was expressly placed upon the ground of fraud. This case was succeeded in point of time by Winterbottom v. Wright, 10 Mees. & W. 109. In that case A contracted with the postmaster general to provide a mail-coach to convey the mail bags along a certain line; and B contracted to horse the coach along the same line. B hired C to drive the coach. It was held that C could not maintain an action against A for an injury sustained by him while driving the coach, by its breaking down from a defect in its construction. The ground of decision was that the defendant's duty with respect to the sufficiency of the coach arose from his contract; and there being no privity of contract between him and the plaintiff, he was under no obligation to the plaintiff on which the latter could sue. Winterbottom v. Wright has been followed with constant approval in a series of decisions in the English courts: Longmeid v. Holliday , 6 Ex. 761; Blackmore v. Bristol etc. R. R. Co., 8 El. & B. 1035, 1049; Redie v. Railroad Co., 4 Ex. 244; Alton v. Midland R. R. Co., 19 Com. B., N. S., 1213; Collis v. Selden, L. R. 3 C. P. 495; Wharton on Negligence, secs. 430, 440. Its standing as an authority was not impaired by the decision of the court of appeals in Heaven v. Pender, 9 Q. B. D. 503. This court and the court of errors substantially adopted the doctrine of Winterbottom v. Wright, 10 Mees. & W. 109, by holding that no duty to a third person could arise out of a contract to which he was a stranger: Cuff v. Newark etc. R. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

"The reason on which this doctrine rests is obvious. The object of the parties in inserting in their contract specific undertakings with respect to the work to be done is to create obligations and duties inter sese. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in the contract in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contract—the employer will have taken from him the power to direct how the work shall be done, and the employé may find himself under responsibilities to third parties

which do not exist between him and his employer. The inconvenience which would arise from allowing a third person to have such an interest in a contract to which he was not a party is referred to by Lord Abinger in Winterbottom v. Wright, 10 Mees. & W. 109. He said: 'The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation supposing the postmaster general had released the defendant? That would at all events have defeated his claim altogether. By permitting this action [which was an action on the case for negligence] we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.'

"No injustice can arise from the application of the principle adjudged in Winterbottom v. Wright; for if the work contracted for be such as that a duty exists toward third persons with respect to it, the party who contracts to have the work done will be liable for damages arising from a breach of the duty, although the injury arose from the fault of the person with whom he contracted: Hole v. Sittingbourne etc. Ry. Co., 6 Hurl. & N. 488. And he will have remedy over against the wrongdoer, either under his express contract to pay damages, or under a contract to that effect which the law will imply: Inhabitants of Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; City of Brooklyn v. Brooklyn City R. R. Co., 47 N. Y. 475, 7 Am. Rep. 469.

"There is a class of cases in which a person performing service or doing work under a contract may be held in damages for injuries to third persons, occasioned by negligence or misconduct connected with the execution of the contract; but these are cases where the duty or liability arises independent of the contract. Thus a servant carried as a passenger under a contract to carry, made with his master, who purchased the ticket, may sue the carrier for personal injuries, or for the loss of his luggage, through the negligence of the carrier. Here the carrier's liability does not depend upon the contract; the fact that the servant is a passenger casts a duty on the carrier to carry him and his luggage safely. He may sue in case for a breach of that duty, but he could not sue upon the contract: Marshall v. York R. R. Co., 11 Com. B. 655; Austin v. G. I. P. R. R. Co., L. R. 3 Ex. 9; Wharton on Negligence, sec. 439; Dicey on Parties, 19. Dalyell v. Tyrer, El. B. & E. 809, which is sometimes cited as being in conflict with Winterbottom v. Wright, 10 Mees. & W. 109, belongs to the class just mentioned. So, also, to quote the language of Parke, B., 'if a mason contracts to erect a bridge or other work in a public road, which he constructs, but not according to contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act by showing that

he was also guilty of a breach of contract and responsible for it': Longmeid v. Holliday, 6 Ex. 767. In cases of this description the wrong done and the liability for it are independent of the contract, and that liability is not taken away by the mere fact of the existence of a contract between the wrongdoer and some third person."

The general rule respecting the freedom of liability upon the part of a person who manufactures an article for another, toward a person who is not in privity with the contract, is based on the theory that there should be an end to litigation: Barnes v. Deliglise, 78 Wis. 628, 47 N. W. 1129.

But a manufacturer who sells an article of his own making impliedly warrants that it is free from latent defects arising from the process of manufacture or the use of defective materials: Monographic note to Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 615.

A clear distinction is, however, as we have before stated, made between sales of articles which are inherently dangerous and those which are not: Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258. But the rule that one who sells and delivers to another an article intrinsically dangerous to human life or health, knowing it to be such, without notice to the purchaser, is liable for injury therefrom, does not rest upon any contractual relation, but upon the principle that the original act of delivering the article is wrongful and that everyone is responsible for the natural consequences of his own act: Weiser v. Holzman, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797; Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. In other words, where the machine manufactured is inherently dangerous, involving almost inevitable consequence of lack of care, he owes to the public at large the duty of extreme caution, but where the machine is not of that character, only the standard of ordinary care applies: Talley v. Beever, 33 Tex. Civ. App. 675, 78 S. W. 23.

In Peters v. Johnson, 50 W. Va. 644, 88 Am. St. Rep. 909, 41 S. E. 190, 57 L. R. A. 428, the court, in discussing the general subject, observed: "There will be found some cases where a seller to one party knows the article is to be used by another. In such case we can base the right on the theory that the third party is the real purchaser, a party to the contract made for his benefit, so that he can sue: Paducah L. Co. v. Paducah W. Co., 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77. Such is the case of George v. Skivington, L. R. 5 Ex. 1, where a husband bought a hair wash for his wife, represented to be good for the purpose, and she was allowed to recover. The case is often cited in this connection, but it seems to me to stand on the ground that the seller sold it knowing that it was to be used by the wife, she being a party to the contract, as it was made for her use. The opinions in the case turn it on this knowledge. The seller's representation was also for her use. The seller also knew the character of the article. A number of cases hold the seller liable to strangers to the contract when he knows of defects

but does not disclose them. They are not apposite in this case. One making bad coal-oil, knowing its defect, was held liable in Elkins v. McKean, 79 Pa. St. 493. Same principle in Wellington v. Downer etc. Oil Co., 104 Mass. 64. Our case in hand is the case of one selling by mistake the wrong article, by negligence or incompetency, as is claimed, selling a hurtful drug for medicine, when a harmless medicine was called for, and injury resulting to a stranger to the sale. Many authorities hold that one who sells provisions for consumption that are bad and hurtful is liable: Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. Much more in the case of hurtful drugs. Would you limit the liability for selling foul food to only him who made the contract of purchase, and leave others at the table, wife, child, boarder, guest without remedy against the first author of the harm? If one contracts to prepare a supper for a ball or festival, and furnishes sickening victuals, ought not anyone injured go to him for reparation? Under the facts is he not under duty to everyone present in addition to his duty to his contracting party? It was held that he was in Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154 Why not also one selling drugs? We must distinguish cases, and not carry the principle of allowing strangers to the contract to sue for damages in every case. We cannot say that everyone injured from defect in a railroad car or carriage or machinery can sue the maker or seller. This would be saying that any stranger could sue for injury for breach of contract resulting in injury to him. Who would sell under such a rule? The explosion of a defective cylinder of a threshing machine did not give action to a person operating it against the manufacturer for want of privity of contract. If the manufacturer knew of the defect, he would be liable; but if he did not, it would be otherwise, though guilty of negligence in manufacturing and testing: Heizer v. Kingsland etc. Mfg. Co., 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630, 15 L. R. A. 821."

An apparent exception to the rules announced in the cases discussed in this subdivision is that of Schubert v. J. R. Clark Co., 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, 15 L. R. A. 818. In that case it was said that one who manufactured and puts a dangerous article in his stock for sale is deemed to have anticipated that in the ordinary course of events it would come into the hands of a purchaser for actual use, either directly or through some intermediate dealer, and is therefore answerable for such damages as result from such use by reason of the faulty and dangerous construction. Hence it was held that if a painter using a stepladder is injured by its breaking because of its being made of poor, cross-grained and decayed lumber, the condition of the lumber being concealed by its being so oiled, painted and varnished that a person could not discover its defects, he may recover damages of its manufacturer, if the latter knew, or ought to have known, of its condition, and that it was dangerous to one using it, and sold it to the painter's employer or to a dealer, with knowledge that the latter would sell it.

The facts in the case just cited are very similar to those in the principal case, in which the court clearly placed the liability upon the ground of fraud on the part of the manufacturer. Although we believe that the conclusion arrived at by the court is correct, still we think that the course of reasoning employed by the court is not entirely satisfactory. The court apparently placed great stress upon the implied warranty of the fitness of the ladder, and yet it also placed considerable reliance upon the fact that the defects in it were concealed by the use of paint and varnish. The court, however, disclaimed any intention to place the liability upon the ground that the painter was the beneficial party to the contract, for it will be observed that the court said: "There was no contract relation between the plaintiff and the defendant, and hence no contract obligation for the violation of which the plaintiff can recover. Neither the plaintiff nor even his employer was a party to the contract of sale pursuant to which the ladder was delivered to the plaintiff. He did not stand in any relation of privity with the contracting parties, the retail merchant who purchased and the defendant who sold the ladder. The contract was not entered into nor executed for his benefit, and if there was any breach of the contract, the plaintiff has no right of action merely for that. If the defendant is liable, it must be upon the ground that the circumstances under which the ladder was manufactured and delivered were such that the neglect to disclose the existence of the defect was a wrong, a neglect of a duty recognized by law independent of contract.

"Accepting the allegations of the complaint as true, we assume that by reason of the defects complained of the ladder was dangerous to the life or limb of a person using it in the way in which such articles are ordinarily used. If there was any legal duty resting on the defendant for the breach of which the plaintiff can complain, it will be more apparent if the alleged negligence and consequent injury are brought into close proximity. Hence we will, for the present, assume that when the ladder was delivered directly to the plaintiff for his use by the defendant, the latter knew the concealed defects, and had reason to apprehend that the use of it by the plaintiff, or by anyone, would be attended by serious personal injury. It would constitute an actionable wrong for the defendant to thus knowingly and unnecessarily do what it had reason to suppose would result in injury to the plaintiff without the intervention of any fault or neglect on his part or on the part of any other person. If the defendant knowingly delivered such an article for the plaintiff's use, it was his duty to warn him of the danger by disclosing the hidden defects, and neglect of that duty would constitute actionable negligence. Everyone may be supposed to understand that such articles are manufactured, sold and disposed of with a view to their being used. They are valuable and salable only because of their supposed fitness for use. One who procures such an article, either from a manufacturer or from a retail dealer, ordinarily assumes without inquiry, and without

any express warranty, that it is what it appears to be, a thing intended for actual use, and that it has not been so negligently manufactured that by reason of concealed defects its use will be attended with danger of serious injury; and this must be supposed to be understood by the person who disposes of it; and if, knowing the existence of such defects, he neglects to disclose them, so that the other party may be warned of his danger, such neglect amounts to bad faith. Under such circumstances, silence partakes of the nature of an assurance that the thing has not any such known but concealed dangerous defect. Silence has the effect and the quality of deceit.''

V. Rule as to Liability of Manufacturer Based on Fraudulent Misrepresentations or Concealment.

Although the forms which deceit may take are so numerous that a general definition of fraud is difficult to formulate, still it has been said to consist of conduct that operates prejudicially on the rights of others, and was so intended. It does not consist in the mere intention, but that intention acted out: Bunn v. Ahl, 29 Pa. St. 387, 72 Am. Dec. 639. It has been very tersely stated that the essential elements in an action for deceit are representation, falsity, scienter, deception and injury: Miller v. John, 111 Ill. App. 56. The main issue in an action for deceit is whether the misrepresentation in fact deceived the injured party and materially affected his conduct: Bowe v. Gage (Wis.), 106 N. W. 1074. And where fraud is the gist of the action, it is not material whether the means or pretense used be language known to be false or conduct, when that is most efficacious for the end calculated and intended to deceive and mislead: Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Chisholm v. Gadsden, 1 Strob. 220, 47 Am. Dec. 550. Though generally mere silence cannot be treated as a representation, a person may put himself in a position where he is bound to speak: Manter v. Truesdale, 57 Mo. App. 435. But mere silence on the part of a vendor who has knowledge of a latent defect in the article is said in some jurisdictions to render him liable in an action for deceit: Brown v. Gray, 51 N. C. 103, 72 Am. Dec. 563. But in other jurisdictions the vendor having knowledge of ''hidden defects'' is not obliged to disclose them. ''He may be silent and leave the purchaser to inquire and examine for himself; but if he be more than silent, if he by acts and words leads the buyer astray, thereby preventing the latter from making further examination or inquiry, he becomes guilty of a fraud of which the law will take cognizance'': Dayton v. Kidder, 105 Ill. App. 107.

In the leading English case which has applied, the doctrine of fraud or misrepresentation with respect to the liability of a manufacturer to third persons, that of Langridge v. Levy, 2 Mees. & W. 519 (affirmed in 4 Mees. & W. 337), a father purchased a gun to be used by himself and his sons which the vendor warranted to be safe and sound, but while being used by one of his sons, it exploded by reason of being defectively constructed, thereby injuring the son, Baron

Parke, in delivering the judgment of the court of exchequer, observed: "If the instrument in question, which is not of itself dangerous, but which requires an act to be done—that is, to be loaded—in order to make it so, had been simply delivered by the defendant, without any contract or representation on his part to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff for the purpose of being so used by him, with an accompanying representation to him that he might safely so use it, and that representation had been false to the defendant's knowledge, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of Pasley v. Freeman, 3 Term Rep. 51, which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him—if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person, to be communicated to the plaintiff, and the plaintiff had acted upon it—there can be no doubt that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person also was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done. If this view of the law be correct, there is no doubt but that the facts which, upon this record, must be taken to have been found by the jury, bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father for the purpose of being used by the plaintiff by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true (for this is the meaning of the term 'confiding') used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less."

Likewise in the principal case, the principle was clearly announced that one who sells an article knowing it to be dangerous by reason of concealed defects is guilty of a wrong without regard to the contract,

and is liable in damages to any person including one not in privity of contract with him, who suffers an injury by reason of his willful and fraudulent deceit and concealment. And hence a manufacturer of a land roller, who attaches to the roller a tongue made of cross-grained black or red oak, which was unfit for that purpose, and which contained both a knot and a large knot hole, the latter of which was filled with a plug of soft wood nailed in, the tongue being so covered with putty and paint as to conceal the character of the wood used and the other defects, is responsible for damages to one not in privity with him who is injured by the tongue breaking while using the land roller in a proper manner: Kuelling v. Lean Mfg. Co., 183 N, Y. 78, ante, p. 691, 74 N. E. 1098. The case of Schubert v. J. R. Clark Co., 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, 15 L. R. A. 818, in which the manufacturer was held liable to a painter, who was injured by the breaking of a stepladder constructed out of cross-grained and decayed lumber, its condition being concealed by paint and varnish, could have been sustained on the principles announced in the principal case. For a discussion of the Minnesota case, see the latter portion of the last subdivision.

The principles of the principal case were also applied in an Indiana case. Thus where the owners of a sawmill and tile factory, knowing nothing about steam boilers or the kind or quality of materials used in constructing them, went to a dealer in steam boilers, explained what they wanted, whereupon the dealer represented that he had a second-hand boiler which was nearly new, none the worse for use, and in just as good shape as it ever was, whereas, as a matter of fact, it was an old one remodeled, patched and worn out, the sheets of metal in it having been burned and rusted until entirely worthless and unsafe for any purpose, the court held that the representations were not mere "dealer's talk," but representations of existing facts falsely and fraudulently made and believed by the purchasers, and hence that the dealer was liable for damages caused by its explosion: Fitzmaurice v. Puterbaugh, 17 Ind. App. 318, 45 N. E. 524. So, also, if the owner of hogs, knowing them to be affected with a dangerous infectious disease, sells them to livestock dealers, who, in ignorance of the condition of the animals, sells them to a third person, who without negligence puts them with other hogs, the original vendor is liable to the last purchaser, not only for the value of the hogs purchased but for the value of those which contract the disease and die: Skinn v. Reuter, 135 Mich. 57, 106 Am. St. Rep. 384, 97 N. W. 152, 63 L. R. A. 743.

VI. Distinction Between Negligence and Fraud on the Part of the Manufacturer.

One who manufactures and sells a piece of defective machinery is not liable to persons other than the vendee for injuries caused by its breakage, unless such machinery is of an inherently dangerous character, and he has failed to make known its true nature, or unless he sold it knowing it to be defective without informing the vendee of

the defect. The fact that the defendant must be charged with the knowledge that the machinery would be operated by such other persons is not a sufficient reason for holding the vendor liable to them for the consequences of mere negligence on his part in using poor materials or putting them together unskillfully: Heizer v. Kingsland etc. Mfg. Co., 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630, 15 L. R. A. 821.

Mere neglect cannot ordinarily be alleged to be willful negligence: Peoria Bridge Assn. v. Loomis, 20 Ill. 235, 71 Am. Dec. 263. Willful neglect must involve either intentional wrong or such reckless disregard of security and right as to imply bad faith: Louisville etc. R. Co. v. Filbern's Admr., 6 Bush, 574, 99 Am. Dec. 690; while gross negligence is defined to be the want of slight diligence or care: Jacksonville etc. R. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093. In Le Lievre v. Gould, [1893] 1 Q. B. 491, Bowen, L. J., observed that "gross negligence might amount to evidence of fraud if it were so gross as to be incompatible with the idea of honesty, but even gross negligence, in the absence of dishonesty, did not of itself amount to fraud."

The general rule showing the distinction between cases of mere negligence and knowledge of the defect amounting to fraud was stated in Lewis v. Terry, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398, 31 L. R. A. 220, wherein the court said: "If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him nor one for whose benefit the contract was made: Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Heizer v. Kingsland Mfg. Co., 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630, 15 L. R. A. 821; Winterbottom v. Wright, 10 Mees. & W. 109, the leading case; Shearman and Redfield on Negligence, sec. 116; 1 Beven on Negligence, 60 et seq. But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. 'It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another, without notice of its nature and qualities, is liable for any injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom to that person or any other who is not himself in fault': Wellington v. Downer K. Oil Co., 104 Mass. 64, per Gray, J.; Schubert v. J. R. Clark Co., 49 Minn. 335, 32 Am. St. Rep. 559, 51 N. W. 1103, 15 L. R. A. 818; Elkins v. McKean, 79 Pa. St. 493; Shearman and Redfield on Negligence, sec. 117. See Civ. Code, secs. 43, 1708. The liability of the willful wrongdoer in like instances is recognized in several cases cited in support of the judgment: Longmeid v. Holliday, 6 Ex. 767; Heizer v. Kings-

land Mfg. Co., 110 Mo. 605, 33 Am. St. Rep. 482, 9 S. W. 630, 15 L. R. A. 821.

"The fact insisted upon by respondent that a bed is not ordinarily a dangerous instrumentality is of no moment in this case; if mere nonfeasance or perhaps misfeasance were the extent of the wrong charged against defendants, that consideration would be important: Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious."

VII. Effect Where Article or Structure is Accepted by Person for Whom It was Made as Being Satisfactory.

The general rule is that a general contractor is not liable to third persons for the negligent acts of an independent subcontractor unless the thing contracted to be done is necessarily a public nuisance, or the injury is the direct result from the act or thing which the independent contractor is required to do: Salliotte v. King Bridge Co., 122 Fed. 378, 58 C. C. A. 456. Hence the negligence of a contractor does not render him liable to third persons for injuries arising therefrom after the completion and acceptance of his work by the person for whom it was done: City of Albany v. Cunliff, 2 N. Y. 165; First Presbyterian Congregation v. Smith, 163 Pa. St. 561, 43 Am. St. Rep. 808, 30 Atl. 279. In Collis v. Selden, L. R. 3 C. P. 495, which arose over the negligent hanging of a chandelier, the court observed, by way of argument, that: "There would be no end of actions if we were to hold that a person having once done a piece of work carelessly should, independently of honesty of purpose, be fixed with liability in this way by reason of bad materials or insufficient fastening. Take the case of a man building a house: His workpeople scamp the work; and five or six years afterward a chimney-stack falls down through a high wind and injures a person with whom he has no contract, to whom he owes no duty, and as against whom he cannot have been guilty of any fraud. To hold him liable to an action at the suit of the injured person would be going far beyond anything which has been decided in our law."

The manufacturer of a steam boiler, after it has been tested and accepted by the person for whom it was manufactured, is not liable to third persons for an explosion occurring as a result of the defective construction of the boiler: Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638. Likewise the owner of a building, who has contracted with a company to install a sprinkler system, cannot recover from the company contracting with the sprinkler company for damages resulting from the collapsing of a tank, which collapsed because of a failure of the contracting company to insert a certain support specified by the plans and specifications, the court saying: "If the law should hold all the builders and makers and doers in the land to a particular duty to their contractees, and at the same time to another absolute duty to

use care that the thing shall be innocuous as it passes through the hands of all mankind—a duty separate and distinct from the first, which might or might not be coextensive with the first, but whether so or not, unavailing to avoid the second—we fancy few persons would be willing to do business in the face of the insufferable litigation that would ensue'': Galbraith v. Illinois Steel Co., 133 Fed. 485. In the case just cited, Judge Grosscup filed a very strong dissenting opinion.

And a contractor who unskillfully and insufficiently fastens the iron or steel beams supporting the wall of a building which he is reconstructing is not liable for the death of a third person who is killed by the falling of the wall, several years after its reconstruction and acceptance by the owner, since even though the wall fell by reason of negligent construction, still there is no causal connection between the injury and negligence, and the contractor owed no duty to the injured party: Daugherty v. Herzog, 145 Ind. 255, 57 Am. St. Rep. 204, 44 N. E. 457, 32 L. R. A. 837. So, also, where a contractor, who in building a hotel, departs from the specifications embodied in his contract, as a result of which a porch collapses, it was held that he was not liable to a third person who was thereby injured, the court deeming it unwise to adhere to the doctrine that would make the builder owe a duty to the whole world that his work is free from hidden defects: Curtin v. Somerset, 140 Pa. St. 70, 23 Am. St. Rep. 220, 21 N. E. 244, 12 L. R. A. 322.

The observation of the court in Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924, that: ''Where the vendor is charged with deceit—where he has induced the vendee's acceptance by false and fraudulent misrepresentations—the latter cannot be said to have consciously taken upon himself any duty of care; and that duty, therefore, if existent, is not shifted from the vendor, and he consequently remains liable,'' would probably be apropos in the case of some construction work.

VIII. Effect Where Machine or Article is Accompanied by Directions for Its Use.

Where a machine is accompanied by directions for its use, the manufacturer is not held to a greater degree of care in its construction than to constitute it of reasonable strength and fitness when used in accordance with directions: Talley v. Beever, 33 Tex. Civ. App. 675, 78 S. W. 23.

IX. Rule as to Liability of Manufacturer of Drugs and the Like.

A manufacturing druggist who sells a poisonous drug labeled as harmless by himself or his agents is liable in damages to a person who, without carelessness on his part and relying on the erroneous label, is injured by using the drug. Likewise prescription druggists are liable for all the resulting damages from the negligent mistakes of their clerks or servants in compounding prescriptions in such a manner that they use poisonous instead of harmless drugs: Mono-

graphic notes to Howes v. Rose, 55 Am. St. Rep. 257, and Woodward v. Miller, 100 Am. St. Rep. 197. A much stronger liability applies to manufacturers or dealers in drugs than to vendors of foods. This liability is based on the theory that drugs and medicines are per se dangerous to human life, and perhaps also because of the great difficulty of one not an expert in detecting their deleterious character: Salmon v. Libby, McNeil & Libby, 114 Ill. App. 258.

Thus an apothecary who sells laudanum instead of tincture of rhubarb, a harmless drug, is liable for the death of the person to whom it was administered: Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298. Likewise where the manufacturer of what is known as a proprietary or patent medicine places on the bottle containing it a label recommending it for certain diseases, and directing a certain quantity to be taken as a dose, but the dose directed contains a sufficient quantity of poison to injure the patient, the manufacturer is liable, since the retail buyer has a right to rely upon the representation made to the public by the manufacturer, who alone knows the constituents of the medicine: Blood Balm Co. v. Cooper, 83 Ga. 457, 20 Am. St. Rep. 324, 10 S. E. 118, 5 L. R. A. 612.

But a soap manufacturer is not liable in damages for loss of trade caused to barbers by using a shaving soap having an excess of alkali which, when applied to the face, caused severe injuries, since, as was observed by the court: "Alkali of some kind is a necessary ingredient of soap, and it is no deceit to include it in the manufacture of the article for the market. It is only the excess of alkali that can render the compound hurtful to the human skin. Unless the defendant knew of this excess, they cannot be held liable": Slattery v. Colgate, 25 R. I. 220, 55 Atl. 639. A manufacturer is not negligent in using a common mordant in dyeing cloth, which was not known at that time to have been poisonous: Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531.

But if a person sells sulphuric acid without labeling it, as required by the statute, to indicate that it is a deadly poison, and such sale is made to the proprietor of a creamery, where it is customary to put buttermilk in jugs for the use of customers and employés, similar to the one in which the acid is placed, and such jug is placed by the purchaser in his creamery alongside of a similar jug containing buttermilk, and a person seeing the jug and asking for buttermilk is by an employé of the creamery invited to drink, and in response to the invitation, instead of taking the jug containing the buttermilk, takes a drink from the one containing the acid, resulting in his death, the negligent act of the seller in not labeling the poison may be regarded as the proximate cause of such death, and he is liable therefor: Burk v. Creamery Package Mfg. Co., 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793.

X. Application of the Rule of Liability.

a. To Articles of Food.—The liability of a vendor of unwholesome foods rests upon privity of contract, even though the injured party

was a guest of the vendee: Copas v. Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690. But if provisions are sold as merchandise to be resold by the buyer, there is said to be no implied warranty that they are fit for food: Monographic note to Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 624. And where the elements of fraud are lacking, a manufacturer of mince meat, prepared in packages, which pass through various hands, is not liable in a suit predicated on negligence: Salmon v. Libby, 114 Ill. App. 258. But a public caterer employed to furnish refreshments at a public ball is liable for any injury suffered by one attending by reason of unwholesome foods furnished by him, the court in that connection observing: "This liability does not rest so much upon an implied contract as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties: Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Longmeid v. Holliday, 6 Ex. 761; Pipin v. Sheppard, 11 Price, 400": Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154. The act of a wholesale butcher in selling a carcass of beef to a retailer without notice that a portion of it was in an advanced stage of putridity is not, however, the proximate cause of the retailer's clerk getting blood poisoned from cutting it up after he knew that it was putrid: Williams v. Wiedman, 135 Mich. 444, 106 Am. St. Rep. 400, 97 N. W. 966. In this general connection, see, also, the monographic notes attached to Woodward v. Miller, 100 Am. St. Rep. 198, and Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 623.

b. To Machinery, Furniture, and Elevators in Buildings.—Negligence in the manufacture of a machine whereby an employé of the purchaser is injured will not sustain a recovery against the manufacturer where the machine is not of an imminently dangerous character, as where it is a machine for use by a manufacturing jeweler, and through a defect in the materials from which it was made a hook broke and caused a heavy drop-weight to fall upon and injure the employé: McCaffrey v. Mossberg etc. Mfg. Co., 23 R. I. 381, 91 Am. St. Rep. 637, 50 Atl. 651, 55 L. R. A. 822. No recovery can be had against the manufacturer of an engine for the killing of an engineer employed by the purchaser of the engine, where the death of the engineer was caused by the breaking of a fly-wheel by reason of the defective working of a prismatic valve which, with the purchaser's consent, had been substituted by the manufacturer for a telescopic valve provided for by the specifications: Marquardt v. Ball Engine Co., 58 C. C. A. 462, 122 Fed. 374. So, also, where a cast-iron fly-

wheel had a visible flaw on the side of its rim, which flaw was pointed out to the buyer and with his knowledge was repaired by the seller by filling it with lead, boring a hole into the center of the sound iron and inserting a rivet to hold the lead, and then painting the wheel, the court held that the seller was not liable to a person who was injured by it while using it, even though the wheel would have been safe with the flaw, but was rendered unsafe by the boring done in repairing it, and even though the person injured knew nothing of the defect: Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 513.

The vendor of a folding-bed who represents the bed to be safe while knowing it to be really unsafe for the purposes for which it was intended to be used, is liable for injuries caused to a person who was about to use it: Lewis v. Terry, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398, 31 L. R. A. 220. A like liability was announced in Cox v. Mason, 89 App. Div. 219, 85 N. Y. Supp. 973, where the seller of the folding-bed, who had agreed to put up the bed in a safe condition for use, was held liable for injuries from its collapsing while being lightly touched for the purpose of airing the bedclothes.

A manufacturer who places an elevator in a building occupied by a merchant for the accommodation of his customers owes a duty to the merchant, but not toward his customers, with respect to freedom of negligence in its construction: Field v. French, 80 Ill. App. 78; Zieman v. Kieckhefer Elev. Mfg. Co., 90 Wis. 497, 63 N. W. 1021; monographic note to Woodward v. Miller, 100 Am. St. Rep. 200.

c. **To Articles of an Explosive Character.**—"The duty owing to the public for the breach of which one injured may recover has respect to and is limited to instruments and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger, and to acts that are ordinarily dangerous to life or property. If the wrongful act be not imminently dangerous to life or property, the negligent vendor is liable only to the party with whom he contracted": Standard Oil Co. v. Murray, 119 Fed. 572, 57 C. C. A. 1. Though some of the earlier cases have held that the putting upon the market of petroleum to be used for illuminating purposes, which the vendors knew to be below the legal fire test, makes the vendor liable to a person who is injured thereby, even though he purchases from an intermediate dealer: Elkins v. McKean, 79 Pa. St. 493; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; still other cases have held an oil vendor not liable for explosions caused by the oil not being of the quality represented: Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; Standard Oil Co. v. Murray, 119 Fed. 572, 57 C. C. A. 1. It has, however, been held in Iowa that the violation of a statutory regulation by the seller in failing to label or mark gasoline as such before delivery to the purchaser is negligence per se, rendering such seller liable for injury to a member of the purchaser's family who uses such gasoline under the belief that it is coal-oil: Ives v. Welden, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408, 54 L. R. A. 854.

And where a manufacturer sells a bottle of champagne cider, which is a dangerous explosive, knowing it to be such, without warning the buyer of its dangerous character or placing anything on the bottle to indicate that it is a dangerous explosive, he is liable to one who, without fault on his part, is injured thereby: Weiser v. Holzman, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797. But in Michigan it was held, before the manufacturer could be held liable to one injured by the explosion of a bottle of champagne cider overcharged with carbonic acid gas, he must show knowledge on the part of the manufacturer: O'Neil v. James, 138 Mich. 567, 110 Am. St. Rep. 321, 101 N. W. 828, 68 L. R. A. 342.

The manufacturer of a gun which is suitable for use with a certain kind of powder is not liable for an explosion from the use of a more explosive powder: Favo v. Remington Arms Co., 67 App. Div. 414, 73 N. Y. Supp. 788. The seller of loaded cartridges which are represented to be the kind asked but which are not, and are of a different caliber, render the seller liable for the damages resulting therefrom: Smith v. Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607. In this general connection see, also, monographic note to Woodward v. Miller, 100 Am. St. Rep. 196, 197.

CHEMICAL NATIONAL BANK v. KELLOGG.

[183 N. Y. 92, 75 N. E. 1103.]

NEGOTIABLE INSTRUMENTS. — **Each Indorsement of a Promissory Note is a Separate Contract,** standing apart from that made by the maker or any other indorser. (p. 718.)

NEGOTIABLE INSTRUMENT—Conflict of Laws.—The Validity of a Contract of Indorsement is ordinarily determined by the law of the place where the indorsement is made. (p. 718.)

ESTOPPEL.—Whoever Conceals Facts Required by Good Faith and Fair Dealing to be disclosed acts inequitably, and will not be permitted to assert these facts to the injury of one misled by such conduct. (p. 719.)

NEGOTIABLE INSTRUMENTS—Laws of Another State, Estoppel to Urge.—A wife who, in New Jersey, indorses a negotiable instrument, on its face dated and by its terms payable in New York, cannot, as against a purchaser of the instrument in the latter state, defend on the ground that it is a New Jersey contract, and by the laws of that state she is not liable thereon because of her coverture, if the purchaser had no notice that the instrument was made or indorsed in another state. (p. 719.)

NEGOTIABLE INSTRUMENT, Presumption as to Place of Making and Indorsing.—A note dated and payable in New York is presumed to have been made and indorsed in that state. (p. 721.)

Action against Amy H. Kellogg on the following promissory note:

"$1,500. New York, June 7th 1898.

"Four months after date I promise to pay to the order of myself Fifteen Hundred Dollars at No. 4 Warren Street, New York. Value received.

(Signed) "D. M. KELLOGG."

(Indorsed): "D. M. KELLOGG.
"AMY H. KELLOGG."

Her defense was that she was an accommodation indorser; that her indorsement was made at her residence in New Jersey at the request of her husband; that she was a married woman, and by the laws of that state a married woman is not liable as an accommodation indorser, guarantor, or surety, unless it appears that she or her estate has derived some benefit from the contract; and that she did not authorize the negotiation of the note in the state of New York, nor know that it was to be used in that state. The plaintiff, a banking corporation, discounted the note in the state of New York in the ordinary course of business, without notice that the defendant was a nonresident of the state or that the indorsement was made in another state.

Frederick H. Kellogg and P. A. Hargous, for the appellant.

William D. Tyndall, for the respondent.

94 VANN, J. Each indorsement of a promissory note is a separate contract, standing apart from that made by the maker or any other indorser: Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193. The validity of a contract of indorsement is ordinarily determined by the law of the place where the indorsement is made: Union Nat. Bank v. Chapman, 169 N. Y. 538, 88 Am. St. Rep. 614, 62 N. E. 672, 57 L. R. A. 513.

As the note in question was indorsed by the defendant in the state of New Jersey where she resided, under ordinary circumstances she would not be liable thereon, because the laws of that state do not permit a married woman to become a simple accommodation indorser. The laws of the state of New York, however, authorize a married woman to contract, even with her husband, the same as if she were unmarried, and it is insisted that the defendant is estopped from denying

that her indorsement is a New York contract, inasmuch as the plaintiff, in good faith, purchased the note for value, before maturity, without notice of anything to put it on inquiry and in reliance upon the fact that it was dated and made payable [95] in the state of New York, with nothing on the face of either the note or the indorsement to suggest that the contract was made in the state of New Jersey. We think this position is sound. Whoever conceals facts required by good faith and fair dealing to be disclosed acts inequitably, and will not be permitted to assert those facts to the injury of one misled by such conduct. The defendant could not make her coverture a trap to catch innocent persons. She could not deliberately give the appearance of validity to her contract, and then as against a bona fide holder plead that it was invalid. She knew that the note was dated and payable in New York, and that the presumption from those facts was that it was indorsed there. She also knew that if she delivered the note in this condition to her husband to enable him to negotiate it, anyone who acted on such presumption, as he lawfully might in the absence of notice, would be injured if she should plead her coverture and that she actually indorsed it in New Jersey. It was, therefore, her duty, if she wished to act honestly toward others, to attach some notice to her indorsement, or give notice in some other way, so that innocent third parties might not be harmed by relying upon appearances which she had aided in creating. If she had written after her name, "Oak Tree, New Jersey," her place of residence, the plaintiff would have been put upon inquiry as to the validity of such a contract made in that state. With no attempt to give notice, by her indorsement in blank she gave currency to the note as one made and indorsed in New York. Pleading her indorsement as a New Jersey contract under these circumstances would be an attempt to take advantage of her own wrong, which the law will not permit.

The business of the country is done so largely by means of commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange trade and hinder the transaction of business. Commercial necessity requires that only slight evidence should be [96] insisted upon to establish an estoppel in pais as to the validity of commercial paper. The only practicable rule is to

make the face of the paper itself, when free from suspicion, sufficient evidence, in the absence of notice, against all who aided to put it into circulation in that condition, unless the note is void by the positive command of a statute, such as the act against usury. No other rule would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act in safety. It is better that there should be an occasional instance of hardship than to have doubt and distrust hamper a common method of making commercial exchanges.

While it was unnecessary that the defendant should describe herself as a guarantor by adding the word "surety" to her signature, for possession by her husband, who was prior in order of liability to herself, was notice that she did not indorse in the ordinary course of business, still if she regarded her indorsement as a New Jersey contract she should have given notice of that fact in some way so that a purchaser in good faith might know that it was not what it appeared to be, a New York contract: Smith v. Weston, 159 N. Y. 194, 54 N. E. 38; Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547. Even in the state of New Jersey, where the common-law disabilities of married women have not been wholly removed, her indorsement would be enforced as a New York contract: Thompson v. Taylor, 66 N. J. L. 253, 88 Am. St. Rep. 485, 49 Atl. 544, 54 L. R. A. 585.

Independently of the statute which will be cited presently, the argument in favor of an equitable estoppel rests mainly on the presumption that a note dated and payable in New York was made and indorsed in that state. While this question has seldom been before the courts, Mr. Daniel in his useful work on Negotiable Instruments says it is the law and the authorities support the assertion: Daniel on Negotiable Instruments, 5th ed., sec. 728; Maxwell v. Vansant, 46 Ill. 58; Towne v. Rice, 122 Mass. 67; Belford v. Bangs, 15 Ill. App 76; Lennig v. Ralston, 23 Pa. St. 137; Snaith v. Mingay, 1 Maule & S. 87; Edwards on Bills and Notes, sec. 378; Tiedeman on Bills [97] and Notes, sec. 91. Even if the question were entirely new, sound reasoning would lead to that conclusion. While the contract made by an indorser is independent of that made by the maker in the sense that it is of a different nature, and can be separately enforced, still it is dependent on the promise of the maker, because it is an agree-

ment to perform his promise, upon certain conditions, if he does not. Therefore, the place where the maker promised, as stated in the note itself, must with all the other provisions thereof be read into the promise of the indorser, and it thus becomes by fair presumption, in the absence of notice to the contrary, the place where the indorser promised also. The purchaser has no other guide as to a fact which may involve the validity of the contract, and hence it is a commercial necessity that both contracts, so closely connected that the second cannot exist without the first, should be presumed to have been made at the same place, unless the one with power so to do rebuts the presumption by timely notice.

The learned counsel for the defendant seems to recognize the existence of this presumption, as he says in his points that, "If we examine the note alone, then the negative inference might possibly arise that the defendant intended the note should be governed by the laws of another state." He insists, however, that as the plaintiff stipulated the facts at the trial, it knew the defendant did not so intend. The rights of the parties do not depend on what the plaintiff knew at the time of the trial, but on what it knew when it discounted the note, and at that time, owing to the absence of notice, which was the defendant's fault, it had no information but what the note gave. The defendant knew that her husband could use the note in any state, and the place of date and payment indicated the state where he expected to use it. Unless she intended that it should be used in a state where her indorsement would bind her, she must have intended to defraud and hence is estopped.

But, to clinch the argument, we have only to refer to the negotiable instruments law, which provides that: "Except 98 where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated": Laws 1897, c. 612, sec. 76. This statute was prepared for uniform action in all the states, and it has already been adopted in many. It is regarded as simply declaratory of the common law upon the subject under consideration: Eaton & Gilbert on Commercial Paper, sec. 66. Therefore, when the note was presented for discount in New York the plaintiff had the right under the statute to presume that it was indorsed in the state where it was dated, because nothing appeared to the contrary. The defendant, by her indorsement, aided in the negotiation of a note carry-

ing with it that presumption, both at common law and according to the statute, and after the plaintiff had acted on the presumption she cannot be heard when she attempts to say that she indorsed in a state where her indorsement is not binding, and that she did not intend to be bound by her promise when she made it.

The judgment should be affirmed, with costs.

Cullen, C. J., Gray, Bartlett, Haight and Werner, JJ., concur. O'Brien, J., absent.

Judgment affirmed.

Conflict of Laws as affecting the rights and obligations of married women is the subject of a monographic note to Locke v. McPherson, 85 Am. St. Rep. 552-578. The capacity of a married woman to contract must be determined by the law of the state where the contract is executed, unless it can fairly be said that she, at the time of its execution, clearly understood and intended that it should be governed by the laws of another state: Union Nat. Bank v. Chapman, 169 N. Y. 538, 88 Am. St. Rep. 614. An accommodation note made and delivered by a married woman to her husband in a state where they are domiciled, and by him taken to another state and there indorsed and delivered by him in exchange for other notes of similar character, is a contract made in the latter state, and the capacity of the wife to bind herself by a contract of suretyship is to be determined by the law of that state: Thompson v. Taylor, 66 N. J. L. 253, 88 Am. St. Rep. 485. And a note executed in one state by a husband as principal and his wife as surety, and payable at a bank in another state, is valid as against her in the latter state, if the law of the state where the note is made permits a married woman to become a surety, although the law of the place of payment does not: Garrigue v. Kellar, 164 Ind. 676, 108 Am. St. Rep. 324.

KILPATRICK v. GERMANIA LIFE INSURANCE COMPANY.

[183 N. Y. 163, 75 N. E. 1124.]

MORTGAGE, Election to Treat as Due, When Irrevocable.—If a mortgage stipulates that upon default in the payment of interest, or any part thereof, the principal sum, with all arrears of interest, shall, at the option of the mortgagee, become and be due and payable immediately, and he elects to exercise such option, the election is irrevocable, and he cannot subsequently rescind it and refuse to receive payment of the mortgage debt. (p. 725.)

PAYMENT BY MORTGAGOR, When Involuntary and Hence Recoverable.—If a mortgagee of real property refuses to accept payment of a debt and release of the mortgage unless paid a bonus to which he is not entitled, and the mortgagor, though protesting, pays the debt with such bonus, such payment is not involuntary, but is made under duress, and an action may be maintained against the mortgagee to recover the amount of such bonus. (p. 727.)

Action to recover one thousand dollars claimed to have been wrongfully exacted from the plaintiff by defendant as a bonus for receiving the payment of a mortgage. On August 28, 1899, the plaintiff executed in favor of the defendant a bond for eighty thousand dollars with a mortgage to secure the payment of the same covering real property in the city of New York. The interest was to be six per cent per annum until the buildings on the premises should be fully completed, and thereafter the interest should be five per cent per annum, payable semi-annually in February and August, with the privilege to the plaintiff of paying the principal sum with accrued interest at any time after August 28, 1900, and before August 1, 1901, upon the payment of an additional sum of one thousand dollars. The mortgage provided that upon default in the payment of interest or any part thereof on any day when the same was payable, the principal sum, with all arrears of interest, should, at the option of the mortgagee, become due and payable immediately.

The plaintiff defaulted with respect to the interest which became due and payable August 1, 1900. Thereupon the defendant commenced an action to foreclose the mortgage, claiming the whole principal to be due by reason of this default. After the service of summons in this action and on August 22, 1900, the defendant entered an ex parte order discontinuing the action and canceling the lis pendens. Plaintiff two or three days before August 28, 1900, became aware of the discontinuance of the suit and offered to pay the principal and interest due on the mortgage, but the defendant refused to receive the same unless paid a one thousand dollar bonus. The plaintiff protesting against the exaction of this bonus, nevertheless paid it and brought this action for its recovery. In the trial court, plaintiff's case was dismissed, and the dismissal was, on appeal, affirmed by a divided court, Justice Hatch and Presiding Justice Van Brunt dissenting, and the plaintiff thereupon appealed to the court of appeals.

E. R. Root and Addison Allen, for the appellant.

J. Brewster Roe, for the respondent.

166 BARTLETT, J. A very narrow question is presented on this appeal. We have a mortgage given on the 28th of August, 1899, payable August 1, 1901. The interest was

payable semi-annually on February and August 1st. The privilege was accorded the plaintiff of paying the principal sum and interest at any time after August 28, 1900, and prior to August 1, 1901, upon the payment in addition to the principal sum and interest of the further sum of one thousand dollars. The mortgage contained the usual covenant that upon default in the payment of interest the principal sum, with all arrears of interest, should, at the option of the defendant, become due and payable immediately. The plaintiff defaulted in the payment of his interest due August 1, 1900.

[167] The plaintiff, represented by his nephew, called upon the counsel for the defendant prior to the time he was served with the summons and complaint and sought to make some arrangement as to the payment of the interest, but was informed that counsel had been instructed to foreclose. A day or two later the plaintiff was served with the summons and complaint in the foreclosure action.

Some time later the plaintiff's nephew again called on counsel for the defendant to notify him that they would be ready to pay the amount of the bond and mortgage with interest within the next day or two, and informed him that they had arranged for a new loan of ninety-five thousand dollars on the same premises covered by the defendant's mortgage. The defendant's counsel then informed the plaintiff's nephew and representative that he was very sorry, but his client had withdrawn its foreclosure suit and proposed to sue for the interest only, and that they should not receive payment of the principal sum due under the bond and mortgage unless plaintiff paid the additional sum of one thousand dollars. This was some three or four days before the 28th of August, 1900, when the parties met and plaintiff paid the principal, interest and one thousand dollars bonus, protesting at the same time that the latter was an illegal exaction and was money not due the defendant.

The sole question presented is whether the payment of this bonus of one thousand dollars was, under the circumstances, voluntary or exacted when the plaintiff was under duress. It will be observed that at the time when the defendant saw fit to avail itself of the covenant contained in the mortgage providing that default in payment of interest should, at its option, make the principal sum and interest due and payable immediately, the time had not yet arrived when the plaintiff was

permitted to exercise his option to pay the principal sum, interest and said bonus at any time after August 28, 1900, and prior to August 1, 1901.

At this time, on August 1, 1900, it was for the defendant to decide whether it would elect to treat the mortgage debt as [168] due; it so elected, and instituted an action of foreclosure. From the moment of this election the mortgage debt became due and the plaintiff was practically warned that he must take measures to protect himself. It is undisputed that before the discontinuance of the foreclosure action the plaintiff had changed his position, had obligated himself to make a new loan on the mortgaged premises, and necessarily had contracted financial obligations in that connection.

After these negotiations for the new loan had proceeded to a point when the plaintiff was advised as to the time when he might expect the money thereon, he notified the defendant that on a day certain he would pay the mortgage and interest. Thereupon the defendant's counsel stated to the plaintiff that the foreclosure action had been discontinued and that an action would be begun to recover the interest only, and that the plaintiff would not be permitted to discharge the mortgage debt and interest unless he also paid the bonus.

The defendant having placed the plaintiff in this position, it had no power by discontinuing the foreclosure action, to restore the status of the parties as existing on August 1, 1900, when plaintiff made default in the payment of interest. The election made by defendant at that time to treat the mortgage debt as due became final and irrevocable after plaintiff's change of position and assumption of legal obligations, the direct result of that election. Thenceforward the right to exact the bonus, so called, of one thousand dollars departed from the defendant, because it had voluntarily waived it by bringing suit to foreclose the mortgage, and expressly alleging its election in the complaint. It could not again elect by withdrawing its previous election. It could not say, "I waive my waiver." The election once made was final and not subject to change at the option of the defendant. Notwithstanding this, the defendant insisted upon the payment of the bonus before it would satisfy the mortgage, and in addition threatened to sue for the interest. Having no right to the bonus, it still insisted on the payment thereof before it would do its legal duty. The plaintiff, in view of the way business is done [169] in giving a new mortgage to pay off the old one, could not

wait to make a tender and take legal action and he was not obliged to. He could submit to the exaction and pay the bonus, and sue to recover it back, because such a payment is not voluntary. In effect the defendant held plaintiff's property in its grasp through its lien thereon and would not surrender it until the unlawful exaction was complied with. The payment was made to free the property from the duress as much as if it had been a chattel and the defendant had it in his possession under a pledge, refusing to part with it unless the bonus was paid. Under these circumstances the compulsion was illegal, unjust and oppressive, and the plaintiff, having submitted under protest, had the right to recover, according to the authorities. The refusal of the defendant to accept the mortgage debt and interest unless the bonus was paid, placed the plaintiff in a position where he was compelled to submit to the exaction in order to receive a satisfaction of the defendant's mortgage and secure the money on the new loan which would protect him in the emergency.

The distinction between a voluntary and involuntary payment is very clearly pointed out in many cases. In Tripler v. Mayor etc. of N. Y., 125 N. Y. 617, 26 N. E. 721, Judge Peckham states (page 625): "The very word used to describe an involuntary payment imports a payment made against the will of the person who pays. It implies that there is some fact or circumstance which overcomes the will and imposes a necessity of payment in order to escape further ills."

In Scholey v. Mumford, 60 N. Y. 498, Judge Rapallo remarks (page 501): "To constitute a voluntary payment the party paying must have had the freedom of exercising his will. When he acts under any species of compulsion the payment is not voluntary."

In Bates v. New York Ins. Co., 3 Johns. Cas. 238, Justice Thompson states (page 239): "The equitable extension of this kind of action [money had and received] has of late been so liberal that it will lie to recover money obtained from anyone by extortion, imposition, oppression, [170] or taking an undue advantage of his situation. In the present case there was, at least, an undue advantage taken of the plaintiff's situation. The money being inequitably demanded of him, he must be presumed to have paid it relying on his legal remedy to recover it back."

In Buckley v. Mayor etc. of N. Y., 30 App. Div. 463, 42 N. Y. Supp. 452, Justice Barrett states (page 465): "There is no ironclad rule which confines an involuntary payment to cases of duress of person or restraint of goods. Money compulsorily paid to prevent an injury to one's property rights comes within the same principle: Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287." This case was affirmed without opinion in 159 N. Y. 558, 54 N. E. 1089.

In Radich v. Hutchins, 95 U. S. 210, 24 L. ed. 409, Mr. Justice Field states (page 213): "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, ... there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, for which the latter has no other means of immediate relief than by making the payment."

In Adams v. Irving Nat. Bank, 116 N. Y. 606, 15 Am. St. Rep. 447, 23 N. E. 7, 6 L. R. A. 491, Judge Brown, referring to the old common-law rule applicable to this subject, states (page 610): "This was the strict common-law rule applied in cases where the duress was against the person seeking to be relieved from his contract. But in practice the narrowness of this doctrine was much mitigated, and money paid under practical compulsion was in many cases allowed to be recovered back, as, for example, payment made to obtain goods wrongfully detained; excessive fees, when taken under color of office; excessive charges collected for performance of a duty, etc. In all such cases there was a moral coercion which destroyed the contract": See, also, Briggs v. Boyd, 56 N. Y. 289; Stenton v. Jerome, 54 N. Y. 480; Baldwin v. Liverpool etc. S. S. Co., 74 N. Y. 125, 30 Am. Rep. 277.

We are of opinion that the plaintiff was under duress when making the payment of the bonus of one thousand dollars [171] and is entitled to recover judgment for that sum with interest.

The judgments and orders of the appellate division and the trial term should be reversed, and a new trial ordered, with costs to the appellant in all the courts to abide the event.

GRAY, J., Dissenting. The plaintiff seeks to recover back from the defendant a sum of money, which, as he claims, was wrongfully exacted from him by the defendant upon his

payment of the principal of a bond given to secure a loan of money to him. His right to it must depend upon whether the money was paid under compulsion; for if the payment was voluntary, with no duress of the person, or of goods, he is concluded. There was neither misrepresentation nor mistake; for the payment was pursuant to an agreement, and I am unable to perceive, in the circumstances disclosed, ground for the recovery.

The plaintiff had borrowed eighty thousand dollars from the defendant and had given his bond, secured by a mortgage of real estate in New York, for the repayment. The loan was to be paid in two years. If default was made in the payment of interest, the principal sum became due immediately. Each instrument contained the following clause: "That the said James Kilpatrick shall have the privilege of paying said principal sum of eighty thousand dollars, with accrued interest thereon, at any time after August 28, 1900, and prior to August 1, 1901 (the due date of the bond), upon payment to said company, in addition to said principal sum and interest, of the further sum of one thousand dollars." Presumably, the one thousand dollars represented an indemnity to the company for the shifting of so large a loan and the temporary loss of the investment. The plaintiff failed to pay his interest on August 1, 1900, and, within a few days the defendant commenced a suit in foreclosure of the mortgage; but, a few days later and before any appearance or answer, voluntarily discontinued it, without costs. After the commencement of the foreclosure action, the plaintiff claims to have arranged to obtain the loan of ninety-five thousand dollars upon the mortgaged [172] property; but the time, or terms, of the arrangement do not appear, nor does it appear that the defendant knew anything of the arrangement at the time when it discontinued the foreclosure suit. What does appear is that a nephew of the plaintiff, after the foreclosure suit was begun, spoke to the defendant's attorney and requested a little more time than the twenty days to answer, as he thought that they would be able to obtain another loan. At a later interview, the defendant's attorney informed him that the foreclosure action had been discontinued and that his client would sue for the interest due, and would not take payment of the principal without the additional payment of the one thousand dollars stipulated for. Thereafter, on August 28, 1900, the plaintiff paid the

amount of the principal of his bond, with the additional one thousand dollars.

It seems to me clear that the payment was, in law, voluntarily made. The defendant abandoned its foreclosure suit and decided to allow the loan to remain. The plaintiff could, then, have paid the interest; but he preferred to pay off the existing loan and to borrow a larger sum upon the property. This he had the right to do; but he could only exercise it by complying with the stipulation of his bond, in paying the one thousand dollars for the privilege. If it should be considered that the defendant, by its commencement of the foreclosure action, had forfeited, or compromised, its rights, then the plaintiff should have made a tender of the moneys due upon his bond; in which event, upon the defendant's refusal to accept them, he could have appealed to the courts to compel the discharge of the mortgage: See Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145. The two courses were open to him, to continue the existing loan, or to pay it off, and he chose the latter, which was to his convenience and advantage, as enabling him to borrow a larger amount. If the bargain shall be said to have been a hard one, the agreement was willingly entered into, and I do not think it should be avoided upon the vague theory of some coercion in fact. It cannot, as I think, well be held that there was any duress, which coerced the plaintiff to make payment. There was no obligation upon him, at the time, to [173] pay the principal; though there was an advantage which he wished to seize upon, in his ability to borrow more upon his property. If the defendant had placed itself in a position where it was bound to take the principal sum, it had withdrawn from that position, and the plaintiff, as I have pointed out, made no tender in discharge of his indebtedness, upon which to predicate a right to have the satisfaction thereof decreed in equity. The utmost he can urge is that the defendant compelled him to abide by the strict terms of his agreement. That was not illegal, and no circumstances are shown which warrant the court in granting relief, whether upon the ground of fraud, or of duress of the person, or of goods, or to prevent injury to property rights.

For these reasons, as for those stated by Mr. Justice Patterson, in the appellate division, I advise the affirmance of the judgment.

Haight, Vann and Werner, JJ., concur with Bartlett, J.; Cullen, C. J., concurs with Gray, J.

O'Brien, J., absent.

Judgment reversed, etc.

The Right to Recover back money which has been paid is the subject of an extended monographic note to New Orleans etc. R. R. Co. v. Louisiana etc. Imp. Co., 94 Am. St. Rep. 408-444.

JACOBS v. COHEN.

[183 N. Y. 207, 76 N. E. 5.]

CONTRACT in Restraint of Trade—Agreement to Employ Only the Members of a Designated Association.—A contract made by an employer of labor by which he binds himself to employ and retain only members in good standing in a single labor union is consonant with public policy and enforceable in the courts, and a note given as collateral security for the performance of the contract, to be applied as liquidated damages for its violation, is valid and enforceable. (p. 736.)

E. H. M. Roehr, for the appellant.

William Liebermann, for the respondents.

208 GRAY, J. The plaintiff sues the makers and the indorser of a promissory note, payable to the order of the Protective Coat Tailors' Union, of which he is the president, to recover the amount due thereon. The answer of the defendants denied the allegations of the complaint, except as to the making of the note, and set up as a distinct and separate defense that it was given "as collateral security to the plaintiff, to be applied as liquidated damages, for violation by the defendants of any of the covenants and conditions of a certain 209 contract." The particular part of the contract set forth is as follows: "That the party of the first part [meaning the makers' firm] shall not employ any help whatsoever other than those belonging to, and who are members of the party of the third part [meaning a 'union' of the firm's employés], and in good standing, and who conform to the rules and regulations of the said party of the third part, and the said party of the first part shall cease to employ any one and all those employés who are not in good standing, and who do not

conform to and comply with the rules and regulations of said party of the third part, upon being notified to that effect by its duly credentialed representatives. That the party of the first part shall not engage any help whatsoever, even those who are members of the party of the third part, without their first having produced a pass-card duly executed and signed by the authorized business agent of the party of the third part; said card to show that the bearer thereof is a member in good standing of the party of the third part, and that he has complied with the rules and regulations thereof in force at that time." The answer then alleged "that the said contract is in restraint of trade, and the said contract has for its purpose the combination of employers and employés, whereby the freedom of the citizen, in pursuing his lawful trade and calling, is, through such contract, combination and arrangement, hampered and restricted, and has also for its purpose the coercing of workingmen to become members of the said employés' organization and come under its rules and its conditions, under the penalty of the loss of their positions and of deprivation of employment, and that such purposes are in restraint of trade, that they hamper and restrict the freedom of a citizen, in pursuing his lawful trade and calling, and that they are against public policy and unlawful." To this defense the plaintiff demurred, for being insufficient in law. The demurrer was sustained at the special term; but, upon appeal to the appellate division, in the second department, the judgment sustaining the demurrer was reversed and the demurrer was overruled. Permission [210] was given to the defendants to appeal to this court, and the following questions were certified for our review, namely: "1. Is a contract made by an employer of labor, by which he binds himself to employ and to retain in his employ only members in good standing of a single labor union, consonant with public policy, and enforceable in the courts of justice in this state? 2. Is the 'second' separate defense, contained in the answer herein of the defendants, Morris Cohen and Louis Cohen, insufficient upon the face thereof to constitute a defense?"

If we refer to the prevailing opinion of the appellate division, it appears that the question in this case was there regarded as within our decision in Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802, and, hence, that the contract was unlawful because contrary to

public policy. In this view I think the learned justices below erred. The contract is annexed to, and made part of, the answer, and is tripartite, between the defendants, Morris and Louis Cohen, a firm engaged in the tailoring business, their employés, represented by an attorney in fact, and a voluntary association, formed by the latter and called the Protective Coat Tailors' and Pressers' Union, of which the plaintiff is president. It provided for the employment by the Cohens of their employés, in their various skilled capacities, for the term of one year; for a system of work by the week; for the number of hours of work and for the mode of payment of the wages and, generally, for the regulation of the relations between the employers and their employés, including this particular agreement not to employ others than members of their employés' union. Whatever else may be said of it, this is the case of an agreement voluntarily made by an employer with his workmen, which bound the latter to give their skilled services for a certain period of time upon certain conditions regulating the performance of the work to be done, and restricting the class of workmen who should be engaged upon it to such persons as were in affiliation with an association organized by the employers' workmen with reference to the [211] carrying on of the very work. It would seem as though an employer should be unquestionably free to enter into such a contract with his workmen for the conduct of the business without its being deemed obnoxious upon any ground of public policy. If it might operate to prevent some persons from being employed by the firm, or, possibly, from remaining in the firm's employment, that is but an incidental feature. Its restrictions were not of an oppressive nature, operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livelihood. It was but a private agreement between an employer and his employés concerning the conduct of the business for a year, and securing to the latter an absolute right to limit the class of their fellow-workmen to those persons who should be in affiliation with an organization entered into with the design of protecting their interests in carrying on the work; as, indeed, the agreement recites. Nor does the answer aver that it was intended thereby to injure other workmen, or that it was made with a malicious motive to coerce any to their injury, through their threatened deprivation of all opportunity of pursuing

their lawful avocation. To coerce workmen to become members of the employés organization through such a contract is not the allegation of something which the law will necessarily regard as contravening public policy. The allegation that its "purposes are in restraint of trade," or that "they hamper and restrict the freedom of a citizen," or "that they are against public policy," is the mere statement of a legal conclusion.

If the question were more correctly presented by some appropriate allegation, I still would be of the opinion that the agreement is not one which comes under the condemnation of the law. The right of workingmen to unite and to organize for the protection of their interests and welfare is not denied. It has been, expressly and recently, declared by this court: Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802; National Protective Assn. v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135. The inviolability of the right of persons to freedom of [212] action may well extend to any concert of action for legitimate ends, if consistent with the maintenance of law and order in the community, and if not interfering with the enjoyment and the exercise by others of their constitutional rights. Their right to combine and to co-operate for the promotion of such ends as the increase of wages, the curtailment of hours of labor, the regulation of their relations with their employer, or for the redress of a grievance, is justifiable. Their combination is lawful when it does not extend so far as to inflict injury upon others, or to oppress and crush them by excluding them from all employment, unless gained through joining the labor organization, or trades union. This we have decided and this the law of the state sanctions: Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802; National Protective Assn. v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 380, 58 L. R. A. 135; Pen. Code, sec. 170. As it was observed in Curran v. Galen, an underlying law of human society moves men to unite for the better achievement of a common aim, and this social principle justifies organized action. Organization, or combination, is a law of human society. It is open to all orders of men who desire to accomplish some lawful purpose through the greater strength and effectiveness which organization offers over individual effort. If surrender of individual liberty is involved in combination,

that is nevertheless but an extension of the right of freedom of action. If, therefore, the organization of workingmen is not obnoxious to moral or to legal criticism, and only the use or directing of the power of the organization to injure others, by preventing them from following their trade, is visited by the law with its condemnation, how can it fairly be said that the refusal of a body of men to work with those not in affiliation with them and an agreement with the employer, by which such are excluded from the shop, is acting beyond legally justifiable limits? Whether the reason for the refusal be purely sentimental, or whether based upon more substantial grounds, such as, for instance, an assurance of the character and of the competent skill of their fellow-workmen, is not material.

The case of Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802, which stands [213] unaffected as an authority, presented a very different state of facts. There the plaintiff demanded damages of the defendants, who were officers and members of an association of workingmen in the brewing business in the city of Rochester, for having conspired to injure him and to take away his means of earning a livelihood. In substance, he alleged in his complaint that he was threatened by certain of the defendants, members of the association, that unless he became a member they would obtain his discharge from employment, and would make it impossible for him to obtain any employment in that city or elsewhere; that, upon his refusing to become a member of the association, the defendants forced his employers to discharge him, and by false and malicious reports circulated in regard to him sought to bring him into ill-repute with members of his trade and employers, and to prevent him from prosecuting his trade and earning a livelihood. The answer to the complaint, among other defenses, set up an agreement between the Ale Brewers' Association in the city of Rochester and the particular association referred to in the complaint, to the effect that all employés of the brewery companies should be members of the association, and that no employé should work for a longer period than four weeks without becoming a member; and that, upon the plaintiff's refusal to comply with defendants' request to become a member of the association, his employers were notified thereof, in accordance with the terms of the agreement with the Ale Brewers' Association. To this matter set up as a de-

fense the plaintiff demurred and the order sustaining the demurrer was affirmed in this court. I endeavored to point out in the opinion that the agreement could be no justification for the acts charged in the complaint, and that it could not legalize a plan for compelling other workingmen to join the defendants' organization, at the peril of being deprived of employment and of making a livelihood. However lawful and legitimate the purposes of the organization of the workingmen may have been, its power and influence were being unlawfully wielded in efforts to keep other persons from working at the particular [214] trade and to procure their dismissal from employment. In the general discussion of the question I conceded the general right of workingmen to organize for the common good of the members, and sought to show how the agreement and acts there in question were contrary to public policy and unlawful, because oppressive and restricting the freedom of others to engage in the same line of occupation, or to make a livelihood at their trade, as a penalty for refusing to join the defendants' organization. That was a very different case from the present one. The subsequent case of National Protective Assn. v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 380, 58 L. R. A. 135, in no wise overruled Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802. It was not at all within the principle of the prior case. It concerned a dispute between rival labor organizations. The plaintiff organization sought to restrain the defendants from preventing the employment of its members and from procuring their discharge by any employer through threats and strikes, and the reversal of a judgment awarding the relief demanded was affirmed by this court. The right of the defendants in that case to refuse to permit their members to work with others, who were members of a rival organization, and to bring about their discharge upon the common work in which they were engaged, if confined to threats to withdraw from the work, or to ordering a strike of their own members, without resort to injurious acts, was admitted. The defendants' effort was not to compel the others to join with their organization as a condition of being allowed to work, and, whether it was to secure only the employment of approved workmen (which was a possible inference from the facts), or whether it was to obtain an exclusive preference in employment, if without resort to force, or the commission of

any other unlawful acts, it was not within the condemnation of the law.

Within even the view expressed by the minority of the judges of this court in the Cumming case (152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802), the contract in the present case was not unlawful, which the employer made with his workingmen. Judge Vann asserted the right of every man "to carry on his business in any lawful way that [215] he sees fit. He may employ such men as he pleases and is not obliged to employ those whom, for any reason, he does not wish to have work for him. He has the right to the utmost freedom of contract and choice in this regard." This contract was voluntarily entered into by the Cohens, and if it provided for the performance of the firm's work by those only who were accredited members, in good standing, of an organization of a class of workingmen whom they employed, were they not free to do so? If they regarded it as beneficial for them to do so (and such is a recital of the contract), does it lie in their mouths now to urge its illegality? That, incidentally, it might result in the discharge of some of those employed, for failure to come into affiliation with their fellow-workmen's organization, or that it might prevent others from being engaged upon the work, is neither something of which the employers may complain nor something with which public policy is concerned.

I think that the question certified should be answered in the affirmative, and, therefore, that the order of the appellate division reversing the interlocutory judgment and overruling the demurrer should be reversed, and that the interlocutory judgment which sustained the demurrer should be affirmed, with costs in all the courts to the appellants.

Justice Vann Dissented, saying: "The business affected did not belong to the union or its members, but to the defendants, who agreed, voluntarily of course, to employ and discharge workmen at the dictation of the union. The labor department of the industry was under the control of the union, for both employer and employed, abrogating their own rights, placed themselves under its command in that respect. This was a form of slavery, even if voluntarily submitted to, for whoever controls the means by which a man lives controls the man himself. Both the proprietors and the workmen seem to have walked under the yoke of the union without a protest. The employers could employ no one who was not a member of the union, and not even then unless he bore its pass-card. They could have no apprentices. Even in an emergency

and with the consent of their workmen they could not exceed the hours of labor prescribed by the union. A baster, however willing, could not sew on a button, and a presser, even if he wanted to, could not make a button hole. If a strong man, capable of working ten hours a day, wished to do so and his employers were willing to pay him extra for the overtime, he could not without the written consent of the union. A qualified workman, not a member of the union, might be unwilling to join, yet he could not get work unless he did. If an employé wished to leave the union, he could not without losing his place. The employers could not hire nonunion men who wished to work for them, nor have extra helpers in their business, and even the workmen themselves could not take apprentices. Employers were bound to abide by the rules and regulations of the union and permit its representatives to enter their shops at any and all hours of the day and night for the purpose of inspection and enforcing the terms of the contract as well as the rules and regulations. The employés could refuse to work during a 'sympathy strike' and paralyze the business without affecting the validity of the agreement. They were bound to obey the rules and regulations of the union, whatever they might be, that were in force at any time during the year covered by the agreement.

"Thus master and men bound themselves by these remarkable stipulations made with a voluntary association, which had no pecuniary interest in the business or in the labor of those employed. The labor of the employés belonged to themselves, and they had a right to sell it to whom they chose and on such conditions as were mutually satisfactory. The business belonged to the defendants, and they had the right to employ any man who was willing to work for them, but by this agreement an outsider intervened and compelled those who owned the business and those who did the work to submit to its direction. As was said by the court below, the will of the employer 'was subjected by executory contract to an arbitrary domination which not only deprived' him 'of all freedom of action, but also crushed the rights and interests of all independent competition in the field of labor.'

"The manifest purpose of the contract was to prevent competition and create a monopoly of labor. A combination of capital or labor, or, as in this case, of both, to prevent the free pursuit of any lawful business, trade or occupation is forbidden both by statute and the common law: Matter of Davies, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855; Laws 1897, c. 383, sec. 1. A labor trust in restraint of free labor is opposed to sound public policy the same as a trust of capital in restraint of free production, and any agreement by which either object is sought to be accomplished is illegal and void. The contract in question was a combination in the interest of monopoly to prevent the employment, as well as to compel the discharge of competent men who were willing to work. Its primary object was to create a monopoly to benefit the members of a single labor union

by compelling the discharge of good men who wished to work but were too independent to join the union under compulsion, or if they were members already, by compelling them to remain such against their will. While there may have been other purposes, they were incidental to this main purpose, which runs through the contract from the first stipulation to the last. The agreement created an unlawful combination or trust, because it monopolized the market by excluding from employment all who did not belong to this one union, and compelled the discharge of all in employment who would not join it. The means used was not persuasion, but coercion. The provisions which restrict both master and men from taking apprentices are significant as a clear violation of public policy, for they tend to prevent the training of youths into skilled workmen to the great disadvantage of the state. The stipulation permitting a strike without a grievance, simply out of sympathy for those employed elsewhere, was also illegal, for it tended to promote business paralysis throughout the country. The employers would be compelled to suspend work, not because their men were dissatisfied with their own condition, but because they felt sorry for others in a less fortunate condition, over which their own employers had no control. In other words, if workmen in California or in Russia struck, with or without just grounds, the party of the second part could strike also.

"This case is quite analogous to that of Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802, which, as it is admitted, has not been overruled, but is still the law. The defense relied upon in that case to justify those who procured the discharge of a workman from employment was an agreement between a brewers' association and a labor union, 'to the effect that all employés of the brewery companies belonging to the Ale Brewers' Association shall be members of the Brewery Workingmen's Local Assembly, 1796, Knights of Labor, and that no employé should work for a longer period than four weeks without becoming a member.' It was alleged that the plaintiff, a nonunion employé, was retained by one of the brewery companies for more than four weeks after notice to become a member of the union, and that the defendants, as a committee of the union, without intent to injure the plaintiff, notified the company of such violation of the agreement, which led to his discharge. It was held that these facts constituted no defense, because the agreement was void as against public policy. The court said: 'Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to impair or to restrict that freedom, and through contracts or arrangements with employers to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our

institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice Barrett in People v. Smith, 5 N. Y. Cr. Rep. 513, "impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages, or the maintenance of the rate." Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here, for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the state. The sympathies, or the fellow-feeling, which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed toward the repression of individual freedom, upon what principle shall it be justified? So far as a purpose appears from the defense set up to the complaint that no employé of a brewing company shall be allowed to work for a longer period than four weeks without becoming a member of the Workingmen's Local Assembly, and that a contract between the local assembly and the Ale Brewers' Association shall be availed of to compel the discharge of the independent employé, it is in effect a threat to keep persons from working at the particular trade and to procure their dismissal from employment.'

"This long quotation is warranted by the strong reasoning which applies directly to the case at hand. I unite with Judge Gray in recognizing that case as a sound exposition of the law. I invoke its authority as controlling this appeal, for the facts of the two cases are so analogous that the same principle must govern both. If the agreement in that case was against public policy, what is to be said of the one before us? That agreement was held void because it required the discharge of workmen if they would not join a particular union, thus compelling them to join against their will. This agreement contains the same requirement, because the phrase 'cease to employ' is merely a euphemism for the word 'discharge,' and in addition there are other provisions equally subversive of personal liberty and equally opposed to public policy.

"Would a court of equity enforce such an agreement by a decree for specific performance? Would it command the employer to discharge workmen simply because they refused to join the union? Would it restrain him from employing competent men because they were not members of the union? Would it restrain him or his employés from taking apprentices? Would it compel both master and man to obey the regulations of the union, whether reasonable or unreasonable?

"The promissory note sued upon is collateral security for the faithful performance of the agreement by the employer, and a violation of any stipulation thereof, according to its terms, renders the note collectible. Will a court of law make the employer pay the note because he refused to discharge a competent man who would not join the union, or who resigned from the union, or refused to obey its rules and submit to its dictation? Will it permit a recovery thereon because nonunion men were employed, or apprentices taken, or for a failure to comply with any one of the many stringent stipulations? I think that neither a court of equity nor a court of law should attempt to enforce the agreement, directly or indirectly, because it is utterly void as a flagrant violation of public policy. I vote for affirmance.

"Cullen, C. J., Haight and Werner, JJ., concur with Gray, J.; Bartlett, J., concurs with Vann, J.

"O'Brien, J., absent.

"Ordered accordingly."

A Contract entered into by the acceptance of a bid for public work tendered in pursuance of an advertisement limiting the right to bid to persons employing, or who will in the future employ, union labor only, is held void in State v. Toole, 26 Mont. 22, 91 Am. St. Rep. 386. See, too, Adams v. Brenson, 177 Ill. 194, 69 Am. St. Rep. 222.

COLLISTER v. HAYMAN.

[183 N. Y. 250, 76 N. E. 20.]

THEATERS AND TICKET SPECULATORS, Effect of Licensing.—The licensing of theaters and of ticket speculators neither adds to nor takes away from the rights of the parties to the contract when the proprietor of a theater sells the ticket. The rights of the purchaser and the duties of the proprietor are measured by the terms of the contract as in fact made by them. (p. 742.)

A THEATER TICKET is a License Issued by the Proprietor pursuant to the contract as convenient evidence of the right of the holder to admission to the theater at the date named, with the privilege specified, subject, however, to his observance of any reasonable

condition appearing on the face thereof. The license, though granted for a consideration, is revocable for the violation of such condition by the holder of the ticket in the manner specified therein. (p. 742.)

THEATERS, Right of to Refuse Admission to Persons Holding Tickets Purchased on the Sidewalk.—The proprietor of a theater has the right to impose and enforce a regulation that if a ticket is sold on the sidewalk admission on it may be refused at the door. A condition to this effect printed on the ticket is valid, and binds every subsequent purchaser thereof, and a ticket speculator who comes lawfully into possession of a ticket is not entitled to an injunction to prevent the enforcement of the condition. (p. 746.)

Suit to restrain the defendants, as proprietors of the Knickerbocker Theater in the city of New York, from interfering with complainant's business of selling, on the sidewalk and outside of the prohibited limits, tickets of admission to the theater. The complaint alleged that the plaintiff was "a licensed theater ticket speculator," and the defendants were managers of the Knickerbocker Theater; that in December, 1901, defendants issued tickets of admission to their theater with coupons attached, numbered respectively aa5 and aa7, on the body of which tickets was printed the following: "Knickerbocker Theater, Al. Hayman & Co., proprietors, December 3, Tuesday evening. Orchestra, $2.00. If sold on the sidewalk this ticket will be refused at the door." Plaintiff alleged that on December 3, 1901, he lawfully came into possession of a large number of tickets of admission, including those above described, and on the evening of that day he was on the street more than five feet removed from any point of entrance of Knickerbocker Theater, engaged in offering the tickets for sale; that the defendants interfered with him by warning persons not to purchase from him, stating to them that the management would not recognize the tickets, and that the purchasers would not be admitted to the theater. The complaint stated various other facts as tending to show the efforts of the defendants to enforce the condition imposed by them, that tickets purchased on the sidewalk would be refused at the door. The special term, on motion of the defendants, dismissed the plaintiff's complaint, and the judgment of dismissal was subsequently affirmed by the appellate division, whereupon the plaintiff appealed to the court of appeals.

Max D. Steuer, for the appellant.

Nathaniel Cohen, for the respondents.

[253] VANN, J. A theater may be licensed like a circus, but the license is not a franchise and does not place the proprietors under any duty to the public, or under any obligation to keep the theater open. The license of a "ticket speculator," so far as it has any validity, simply authorizes him to conduct his business on the sidewalk, within the limits prescribed: City Charter, secs. 50, 51, 1472, 1473. Neither the license to the owner of the theater nor the license to the ticket speculator adds to or takes from the rights of the parties to the contract made when the proprietor sells a ticket. The rights of the purchaser and the duties of the proprietor are measured by the terms of the contract as in fact made. "The privilege accorded by the city authorities cannot change the inherent nature of a theater ticket." The ticket is not the contract, although to some extent it is evidence thereof. The contract is implied from the circumstances, and is an agreement on the part of the proprietor for the consideration mentioned to admit the holder of the ticket, upon presentation thereof to his theater at the date named, with the right to occupy the seat specified and to there witness the performance.

A theater ticket is a license, issued by the proprietor pursuant to the contract as convenient evidence of the right of the holder to admission to the theater at the date named, with the privilege specified, subject, however, to his observance of any reasonable condition appearing upon the face thereof. The license, although granted for a consideration, is revocable for a violation of such condition by the holder of the ticket in the manner specified therein: Purcell v. Daly, 19 Abb. [254] N. C. 301; Wood v. Leadbitter, 13 Mees. & W. 838; Burton v. Scherpf, 83 Mass. 133, 79 Am. Dec. 717; McCrea v. Marsh, 78 Mass. 211, 71 Am. Dec. 745; Greenberg v. Western Turf Assn., 140 Cal. 357, 73 Pac. 1050; 28 Am. & Eng. Ency. of Law, 2d ed., 124; Pingrey on Extraordinary Contracts, sec. 509; Wandell's Law of the Theater, 221; Goddard on Bailments and Carriers, sec. 333.

The main question presented for decision is whether the defendants had the right to make a contract with purchasers upon the condition printed in the ticket. There is no restraint by statute against such a condition, and it is not opposed to public policy. There is no tendency toward monopoly, for anyone can buy and sell theater tickets, provided the sales are not made on the sidewalk, where the tickets themselves

provide they cannot be sold. The law does not prevent the proprietor of a theater from making reasonable regulations for the conduct of his business and imposing such reasonable conditions upon the purchasers of tickets as in his judgment will best serve the interests of that business. A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theater is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor which tends to protect his patrons from extortionate prices is reasonable, and he has the right to make it a part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least four thousand dollars a year from his business. That amount, of course, came out of patrons of the theater, and if other ticket speculators carrying on the same business at various theaters in the city of New York are equally successful, the additional expense to theater-goers must be very large.

The defendants were conducting a private business which, even if clothed with a public interest, was without a franchise [255] to accommodate the public, and they had the right to control it the same as the proprietors of any other business, subject to such obligations as were placed upon them by the statute hereinafter mentioned. Unlike a carrier of passengers, for instance, with a franchise from the state and hence under obligation to transport anyone who applies and to continue the business year in and year out, the proprietors of a theater can open and close their place at will and no one can make lawful complaint. They can charge what they choose for admission to their theater. They can limit the number admitted. They can refuse to sell tickets and collect the price of admission at the door. They can preserve order and enforce quiet while the performance is going on. They can make it a part of the contract and a condition of admission, by giving due notice and printing the condition in the ticket, that no one shall be admitted under twenty-one years of age, or that men only or women only shall be admitted, or that a woman cannot enter unless she is accompanied by a male

escort, and the like. The proprietors in the control of their business may regulate the terms of admission in any reasonable way. If those terms are not satisfactory, no one is obliged to buy a ticket or make the contract. If the terms are satisfactory and the contract is made, the minds of the parties meet upon the condition and the purchaser impliedly promises to perform it. There is no rule of law that prevents the enforcement of the contract in the manner provided thereby, which is to refuse admission to the holder of a ticket who bought it on the sidewalk. Where the condition is part of the contract at its origin, it continues a part thereof as long as it exists, and binds all subsequent holders with notice. The case would be very different if, after the sale of a ticket containing no evidence of the restriction, an attempt were made to enforce it against a purchaser without notice. The purchaser is warned in advance of what he is buying. He has notice before he buys of the condition which the proprietors saw fit to make a part of the contract. He acts with his eyes open, and if he does not like the condition he need [256] not buy, but if he buys he impliedly assents to the condition which controls not only himself, but any purchaser from him. When the plaintiff came lawfully into the possession of the tickets in question with others, as he alleges, he had notice of the condition which appeared upon the face thereof, and was bound thereby. He bought subject to that condition, and every right he acquired was subordinate thereto. The ticket was assignable, for there was no restriction in the contract against selling it except in a particular place, and a transfer could be made by simple delivery. The plaintiff, therefore, took it with the right to sell to any person at any time and in any place that he saw fit, provided he did not violate the condition which imposed no unreasonable restraint upon the assignability of property. When he tried to sell on the sidewalk, he clearly acted in defiance of the contract and violated the condition to which he had given an implied assent. With notice that if he sold the ticket on the sidewalk it would be refused at the door, he was attempting to sell on the sidewalk when the defendants, by their signs and agents, warned intending purchasers that the condition would be enforced and that the holder of a ticket purchased from him under such circumstances would be denied admission. The defendants did nothing but notify people, so that they could not be imposed upon by him and induced

to purchase tickets which would be of no use because sold in violation of the contract.

This is not a case involving the liberty of the plaintiff to sell his property, for he could sell it to any person and in any place, except in the one prohibited by the contract which constituted the property. The contract did not interfere with his absolute freedom of action except to this limited extent duly agreed upon in advance, while he attempts to interfere with freedom of contract on the part of the defendants by restraining them from enforcing an agreement which they had made and to which he had assented.

Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid 257 almost without limitation, but what the legislature may prohibit parties from agreeing upon is subject to the limitations of the fundamental law. Those limitations do not bear upon the case now before us. Our recent decision in People v. Warden etc., 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006, 43 L. R. A. 264, relied upon by the appellant, is not analogous. We there adjudged unconstitutional a statute which prohibited as a crime the selling of transportation tickets by any person except common carriers and their specially authorized agents, in so far as it undertook to prohibit citizens of the state from engaging in the business of brokerage in passenger tickets. This case involves not a statute but a contract, which excludes no one from carrying on the business of selling theater tickets, but simply prevents a sale thereof on the sidewalk in violation of the express stipulation of the tickets themselves.

The statute entitled "An act to protect all citizens in their civil and legal rights," has no application: Laws 1895, c. 1042; People v. King, 110 N. Y. 418, 6 Am. St. Rep. 389, 18 N. E. 245, 1 L. R. A. 293. That act provides for the equal accommodation of all persons in "places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." It makes it a misdemeanor to deny "any citizen, except for reasons applicable alike to all citizens of every race, creed or color, and regardless of race, creed and color, the full enjoyment of any of the accommodations, advantages, facilities or privileges," enumerated in the statute, including theaters by specific mention. This contract has no bearing upon the resale of tickets in violation of a contract made

with the original purchaser. It was especially designed to prevent the exclusion from "places of public accommodation or amusement" of anyone on account of race, creed or color; and apparently was also intended to prevent any discrimination founded on rank, grade, class or occupation. The contract and tickets in question did not discriminate against any person on account of any reason named in the statute, for the same condition is imposed upon all, and all are treated alike. The holder is not excluded because he bought of the plaintiff, but because [258] he bought in the prohibited place. The plaintiff was not excluded, for he could have used the tickets himself. No class of persons was excluded, such as lawyers, doctors, merchants or mechanics, but simply those who bought in violation of the terms of the contract after notice thereof.

We think that the contract with the original purchaser of the tickets was valid; that the express condition named therein bound all subsequent purchasers, and that it could be enforced in the manner provided thereby. The judgment should, therefore, be affirmed, with costs.

Cullen, C. J., Gray, O'Brien, Bartlett, Haight and Werner, JJ., concur.

Judgment affirmed.

The Law of Theaters and like shows is the subject of a recent monographic note to Sigel's Estate, 110 Am. St. Rep. 525-537.

JONES v. BRINSMADE.

[183 N. Y. 258, 76 N. E. 22.]

ALIMONY in a Wife's Suit to Annul Her Marriage.—In an action by a wife against her husband to annul her marriage on the ground that he was insane when it was contracted, the court has no power to grant alimony and counsel fees pendente lite. (p. 750.)

James C. Bergen, for the appellant.

William H. Wherry, Jr., and W. Osgood Morgan, for the respondent.

[259] CULLEN, C. J. The question presented by this appeal and certified by the court below is: "In an action

brought by a wife against her husband to annul their marriage on the ground that the husband was insane at the time the marriage was contracted, has the supreme court jurisdiction and power to grant an application made by the plaintiff—the wife—that the defendant—the husband—be compelled to pay her alimony pendente lite and counsel fee, and to make an order directing such payments to be made by defendant?" While neither the Revised Statutes nor the present code authorize [260] in express terms the court to award alimony and counsel fee in an action to annul a marriage, it has been the settled law under both systems of statutory procedure that the court has such power where the action is brought against the wife: North v. North, 1 Barb. Ch. 241; Griffin v. Griffin, 47 N. Y. 134; Higgins v. Sharp, 164 N. Y. 4, 58 N. E. 9. The learned counsel for the appellant concedes this proposition, but contends that under the equally well-settled rule prevailing in this state alimony and counsel fee will not be granted the wife when she seeks to annul the marriage on account of its original invalidity. No express statutory authority being given, the power of the court to make such an allowance is sustained as incidental to the statutory jurisdiction to entertain an action to annul a marriage: See cases cited above. Therefore, especially in an action of this character, more than in an action for divorce, is the rule stated by Judge Rapallo in Collins v. Collins, 71 N. Y. 269, applicable: "Where the facts are such that, on general principles of equity, a plaintiff is not entitled to demand alimony, the question becomes one of law, reviewable in this court." Though the exact point has not been determined by this court, the doctrine seems to have been well established in the old court of chancery that where a wife files a bill against her reputed husband to annul a marriage, upon any cause which goes to the legality of the marriage originally, the allegations in her bill will be taken as true against herself, and an allowance to her to maintain the suit will be denied (North v. North, 1 Barb. Ch. 241; Bartlett v. Bartlett, Clark Ch. 460), and since the abolition of the court of chancery the great weight of authority in the supreme court is to the same effect: Bloodgood v. Bloodgood, 59 How. Pr. 42; Isaacsohn v. Isaacsohn, 3 N. Y. Law Bull. 73; In re Michaelson, 25 N. Y. Daily Reg.; Meo v. Meo, 22 Abb N. C. 58, 2 N. Y. Supp. 569; Herron v. Herron, 28 Misc. Rep. 323, 59 N. Y. Supp. 861. In Griffin v. Griffin, 47 N. Y. 134,

the question was as to the power of the court to award alimony and counsel fee in an action brought against the wife to annul the marriage, but Judge Rapallo, speaking for this court, recognizes the [261] rule to be as I have stated, saying: "It is also very properly restricted to cases where the wife admits the existence of a valid marriage and seeks a divorce or separation for subsequent misconduct of the husband. Where she denies the existence of the marriage, she cannot consistently claim that the defendant is under any obligation to provide her with means to carry on her suit against him." In Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460, though like the last case in that the point was not involved, Judge Folger makes a similar statement: "In an action by the wife for divorce or by the husband for a decree that the marriage is null, in which the putative wife avers the existence and legality of the marriage, though the alleged husband denies it, the court may, in its discretion, allow to the putative wife temporary alimony and money to carry on the action from the means of the alleged husband." In Higgins v. Sharp, 164 N. Y. 4, 58 N. E. 9, the question was the same as in the Griffin case (47 N. Y. 134), and there is nothing to be found in the opinion rendered by Judge O'Brien intimating that alimony should be allowed a wife seeking to establish the invalidity of her marriage. Counsel for the respondent cites three cases as sustaining a contrary rule. Allen v. Allen, 59 How. Pr. 27, was a suit by the wife to annul a marriage for the impotency of the husband; alimony and counsel fee were awarded. The case was decided at special term without opinion and without the citation of authority for its support. Anonymous, 15 Abb. Pr., N. S., 307, is not in point. There the husband obtained by default a decree against his wife annulling the marriage and again married. The first wife had the decree opened and was allowed to defend. Thereafter the second wife was permitted to intervene in the action apparently on a suspicion that the opening of the decree was an artifice by the husband to get rid of her. The court allowed the intervening wife counsel fee. The situation in that case was the exact reverse of this. Counsel fees were allowed to a woman who sought to sustain the validity of her marriage, not to avoid it. Finally, we have Gore v. Gore, 103 App. Div. 74, 92 N. Y. Supp. 634. There alimony and counsel fee were awarded a wife seeking [262] to annul a marriage for the impotency of her husband. The

learned court was of opinion that the marriage being void under the statute (Domestic Relations Law, sec. 4, art. 1) from the time its nullity was declared by a court of competent jurisdiction, until that time the plaintiff possessed the same rights and was entitled to the same favor as a wife by a marriage concededly valid in an action against her husband for his subsequent misconduct. In support of this position the respondent cites the section of the Domestic Relations Law referred to. But a comparison of that section with section 4 of 2 Revised Statutes, 138, will show that the later statute, so far as it relates to the question before us, is but a re-enactment of the earlier statute, the words not being changed, but being transposed in the order in which they are found. There is, therefore, no change in legislation which justifies any change in the rule that has hitherto obtained.

Conceding that the marriage of a lunatic is voidable, not void, and that it becomes void only upon a decree annulling the marriage, does it follow that while electing to have her marriage declared void a plaintiff can insist that she is entitled to all the rights of a wife under a valid marriage until the time the decree is rendered? I think the learned court in the Gore case failed to appreciate that the status of the parties established by a decree of nullity necessarily relates back to the time of the contract of marriage. This is the rule applicable to other contracts sought to be rescinded for fraud or other infirmities; he who elects to rescind a contract can claim nothing under it. As to the effect of a decree of nullity it is said by Mr. Bishop (1 Bishop on Marriage and Divorce, sec. 118): "The doctrine may have a limit under the operation of a statute, but it appears to be universal under the unwritten law that, when a voidable marriage has been set aside by a decree of nullity, the parties are regarded as having never been married. For example, the children, before legitimate, become by force of the decree illegitimate, and the late husband is treated as having never acquired any right to the property of the wife, though the 263 claims of third persons are to some extent respected." The same is true of the property rights of the wife. This rule, so far as it affects the issue of the marriage, has to some extent been modified by our statute. The child of a marriage annulled on the ground of the lunacy of one of its parents is regarded as the legitimate child of the parent who

was of sound mind: Code Civ. Proc., sec. 1759. Such being the effect of a decree annulling a marriage, even though the marriage is only voidable, it seems both unjust and inconsistent that a wife should be allowed alimony and counsel fee out of her husband's estate to establish the invalidity of her marriage, on the theory that by virtue of the marriage relation the husband is bound to provide for her, when if she is successful in that suit her status will be the same as if she had never married him.

The orders of the appellate division and the special term should be reversed and the motion denied, but without costs in any court.

GRAY, J. I agree with the chief judge that this appeal should be sustained. In the absence of any provision of our statutes, which authorizes an award of alimony and of counsel fee, when the action is brought to annul the marriage between the parties, and conceding to the court the authority to make such, as being incidental to its jurisdiction to entertain the action, it seems to me very clear that the power cannot, with any legal propriety, be exercised in such a case as this.

I am for asserting the rule that, where the wife, as here, declares her marriage to have been null, and, for that cause, seeks to have the marriage contract adjudged to have been void, she has no more an equitable ground than she has a legal reason for demanding that the defendant's estate be charged with her support. When she is in the position of asserting the validity of her marriage and is defending its validity, she may, consistently, invoke the power of the court to compel a provision for her maintenance and defense, until the action 264 has determined the relations of the parties, and, while I did not take part in the decision of Higgins v. Sharp, 164 N. Y. 4, 58 N. E. 9, I recognize it as authority upon this proposition and no further.

O'Brien, Bartlett, Haight, Vann and Werner, JJ., concur.

Ordered accordingly.

The Allowance of Alimony in actions to annul marriages is discussed in the monographic note to Deeds v. Strode, 96 Am. St. Rep. 296.

SCHAGHTICOKE POWDER COMPANY v. GREENWICH AND JOHNSONVILLE RAILWAY COMPANY.

[183 N. Y. 306, 76 N. E. 153.]

MECHANICS' LIENS, Materials, Explosives, Whether are.—Dynamite furnished to a railroad contractor to be used, and actually used, in breaking up frozen earth, so that it can be handled by a steam shovel in grading and building the roadbed, is material furnished for the improvement of real property, and a lien may be claimed and enforced therefor. (p. 755.)

MECHANICS' LIEN Against Railways.—A lien may be acquired against a railway corporation for materials furnished and used in the construction of its roadbed. (p. 756.)

George W. Curry, for the appellant.

Clarence W. McKay, for the respondent.

308 WERNER, J. The respondent Ludington entered into a contract with the defendant railroad company to construct an extension of its line between the villages of Greenwich and Schuylerville in this state, and, among other things, agreed to save the railroad company harmless from and against all valid liens that might be filed for work done under the contract. With the consent of the railroad company Ludington sublet a portion of the work, including the grading, to the defendants Inman & Fox, who purchased of the plaintiff, the Schaghticoke Powder Company, a quantity of dynamite for use in breaking up frozen earth, so that it could be handled by means of a steam shovel that was employed by the subcontractors in the grading and building of the roadbed. The dynamite thus furnished was actually used by the subcontractors for the purpose mentioned, and the trial court found that it was furnished and used with the knowledge and consent of the defendants, the railroad company and Ludington; that no part of the same had been paid for, and that the powder company had filed the usual notice of lien in compliance with 309 the terms of the statute. The trial court further found "that the said materials so furnished by the plaintiff, the Schaghticoke Powder Company, were not materials used for the improvement of real property within the language or intent of the lien law, but the same were used merely as explosives principally to break up frozen earth so that it could be handled." Upon

this finding a judgment was entered dismissing the complaint as to the plaintiff powder company, and upon appeal to the appellate division that judgment has been unanimously affirmed.

Two questions are presented for our consideration upon this appeal: 1. Are the materials furnished by the appellant herein such as are contemplated by the provisions of the lien law? 2. Can a lien be acquired against a railroad company for materials furnished and used in the construction of its road?

It is obvious that we must look to the lien law for the answer to these questions. Section 3 of that law (Laws 1897, c. 418; Gen. Laws, c. 49), relating to mechanics' liens, provides that "A contractor, subcontractor, laborer or materialman, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien." The railroad company, through its indemnitor, Ludington, has thus far successfully contended that the dynamite furnished by the appellant does not come within the definition of materials furnished, as those terms are used in the statute. The argument is that no lien can be acquired under this law for materials that do not go directly into and form a permanent part of some building or structure upon real estate, and that explosives used in blasting rock or breaking up earth are not such "materials" within the purview of the statute. The position of the appellant is that the explosives used by the subcontractor in breaking up earth which must be excavated or removed in the construction of the roadbed are "materials" used in the improvement of real estate within the fair and reasonable interpretation of the [310] language of the statute, and are as much a part of the work of improvement as the manual labor that goes into it.

The question thus presented is not free from difficulty, but after a careful consideration of the statute we feel constrained to hold that the position taken by the appellant is more logical and more in consonance with the evident purpose of the legislature than that taken by the respondent.

As bearing upon the construction of the statute, the history of legislation upon the subject of mechanics' liens and the report of the commissioners, whose revision resulted in the present lien law, are both interesting and instructive. In their report to the legislature the commissioners of revision

said: "The underlying principle of all legislation of this character is that a person who, at the request or with the consent of the owner of real property, enhances its value by furnishing materials or performing labor for the improvement thereof, should be deemed to have acquired an interest in such property to the extent of the value of such materials or labor. This principle should be applicable generally to improvements of real property. It is not necessary, therefore, to detail the particular kinds of improvements for which the lien will exist, as has been done in the act of 1885. By defining the terms 'improvement,' 'owner,' 'real property,' etc., in a broad and comprehensive manner, it will be possible, by the use of such terms, to omit superfluous words and expressions formerly used to apply generally the principle above enunciated. The article relating to mechanics' liens has been made so general in its scope as to include every case where labor is performed or material furnished for the permanent improvement of real property."

Beginning with the statute of 1869 (chapter 558), which amended the earlier act of 1854, we observe that it gave a lien for the value of any labor and material performed and furnished in erecting, altering or repairing any house, building or the appurtenance to any house or building and upon the land upon which the same shall stand. Passing without comment the various local statutes of limited scope and effect enacted from [311] time to time thereafter, we come to the general lien law of 1885 (chapter 342), which created liens for labor or services performed or materials furnished and used, or to be used, in erecting, altering or repairing any house, wharf, pier, bulkhead, bridge, vault, building or appurtenance to any house, building or building lot, including fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees. When these statutes are read in connection with the report of the commissioners of revision made in presenting the lien law now in force to the legislature, it becomes obvious that while the law of 1885 was much broader in scope than any of its predecessors, it was not considered liberal enough to cover all the cases in which labor performed or materials furnished resulted in the improvement of real property, and thus contributed to the permanent enhancement of its value. It would be difficult to suggest anything more comprehensive than the language used in the present statute. Any "contractor, subcontractor, laborer or mate-

rialman who performs labor or furnishes materials for the improvement of real property" shall be entitled to a lien. When this language is contrasted with the specific and restricted phrases of the former statutes, it is plain that the legislature intended to bring all labor performed or materials furnished in the improvement of real estate, no matter by what name they may be called or by what description they may be designated, within the liberal and beneficent purposes of the statute. In this view of the statute we do not see why the materials furnished by the appellant are not comprehended within its terms. It may be admitted that dynamite used in blasting rock or breaking up earth does not, in a narrow and technical sense, enter into and remain a part of the permanent structure which contributes to the improvement of real estate. The same thing may be said of the labor performed upon it. But in a broad and practical sense explosives so used might be said to partake of the nature of both materials and labor. They can be regarded as materials in so far as they constitute physical substances which are furnished and used in the performance of the work for which they are designed; they [312] might also be considered as substitutes for labor to the extent that they contain a potential energy which takes the place of manual labor or mechanical appliances. But we go no further than to hold that explosives used in the doing of work for the improvement of real property are materials within the meaning of the statute. It is a familiar rule that in the construction of statutes their language must be adapted to changing conditions brought about by improved methods and the progress of the inventive arts. To deny to such a substance as dynamite used for such a purpose the attributes of materials, when there is nothing in the statute to require it, would be a backward step, since it would necessitate a recurrence to the cumbrous and ineffective method of enumerating in the statute everything that can be thought of to-day, at the risk of rendering it nugatory on the morrow because its language is not broad enough to keep pace with the march of development.

The argument that dynamite is not a material, but a part of the contractor's plant which, like picks and shovels or mechanical appliances, are used in the performance of work, but are not considered materials furnished within the purview of the statute, seems to us inherently unsound. A steam shovel, an

engine and boiler, picks, shovels, crow-bars and the like, are tools and appliances which, while used in the doing of the work, survive its performance and remain the property of their owner. Not so, however, with materials that are used up in the performance of the work and are thereafter invisible except as they survive in tangible results. We think that explosives when used as substitutes for other recognized "materials" are covered by the same principle. They enter into and form a part of the permanent structure quite as much as the earth, rails, ties, culverts and bridges that we can see and feel. The question is, not how far this principle may be extended by fanciful argument to matters which may have a very remote or indirect relation to real property upon which a lien is claimed, but whether under the broad and comprehensive language of the lien law, which is to be construed liberally to secure the beneficial interests and purposes thereof [313] (section 22), explosives used as materials in blasting or excavating can fairly be made the basis for a lien.

The adjudication upon this subject in this and other jurisdictions are of little weight as actual authorities, since they are all based upon statutes differing in phraseology and scope from our own present lien law, but we refer to the reasoning in a few of them as quite applicable to the case at bar. In the case of Hazard Powder Co. v. Byrnes, 21 How. Pr. 189, it was held that powder and fuse necessarily used by the contractor in blasting for the foundation of a building upon which the lien was claimed were "materials in building" within the lien law of 1851. It is but fair to say, however, that there the contract imposed upon the builder the duty of removing rock from the surface of the land preparatory to laying the foundation walls, and that fact was given prominence in arriving at the decision. In Giant Powder Co. v. Oregon Pac. Ry. Co., 42 Fed. 470, 8 L. R. A. 700, the federal circuit court held that powder used in the construction of a railroad fell within the designation of materials furnished under a lien law of Oregon, and in the course of the discussion used the following language: "This powder was not only 'used' in the construction of this road, but it was thereby necessarily consumed, and it was so intended. It was furnished to be so used in the construction of this road. Nice questions may arise as to whether material is 'used' in the construction of a road as a tool or plant simply, or

so used and consumed as to entitle the furnisher to a lien on the result for its value. The food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used. Mason work may be done on a road in a dry country or season when large quantities of water must be hauled many miles for the preparation of the necessary mortar. Upon the completion of the structure and the hardening of the mortar, the water has as thoroughly disappeared as the powder after the blast. Again, lumber may be used in the [314] construction of a building for the purpose of scaffolding. However, it does not thereby literally enter into the composition of the building, nor, so to speak, become a part of it. But, in my judgment, both it and the water have been 'used' in the construction of the building and mason work, within the meaning of the lien law, and the purposes for which it was enacted. And so I think this powder was 'used' in the construction of this section of the road, whereby it was consumed, not gradually and incidentally, as a tool or part of a contractor's plant, but wholly and at once, in aiding to clear and fit the roadway for the reception of the ties and rails."

To the same effect are Hercules Powder Co. v. Knoxville etc. R. R. Co., 113 Tenn. 382, 106 Am. St. Rep. 836, 83 S. W. 354, 67 L. R. A. 487, and Rapauno Chem. Co. v. Greenfield etc. Ry. Co., 59 Mo. App. 6. While we do not subscribe to all that was said arguendo in the Oregon case (supra), the illustrations there used are pertinent as showing that the claim of the appellant at bar is fairly brought within the purview of our statute by a liberal and reasonable construction of its provisions.

Nothing said or decided in Ward v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674, or Watts-Campbell Co. v. Yuengling, 125 N. Y. 1, 25 N. E. 1060, and the other cases cited by the respondent in support of his position seems to be in conflict with the views above expressed. These cases were decided under earlier statutes and upon facts that are clearly to be differentiated from those at bar.

We are also of the opinion that the question whether a lien can be acquired against a railroad corporation for materials furnished and used in the construction of its railroad must be answered in the affirmative. By section 2 of the lien law

the term "real property" "includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle-work, and structures connected therewith, erected for the use of railroads." If we understand the argument for the respondent, it is that as to railroads the general language of section 3 of the lien law, giving the right to a lien in favor of one who furnishes materials or performs labor for the improvement of real property, [315] is limited by the language of section 2 defining the term "real property" so as to restrict the right of lien to labor performed and material furnished upon bridges and trestle-work and the structures connected therewith erected for the use of railroads. We are not impressed by this argument. We think the addition of the words "and all bridges and trestle-work and structures connected therewith erected for the use of railroads" to the general definition of the term "real property" denotes a legislative intent to enlarge, rather than restrict, the statutory meaning of that term as applied to the subject of mechanics' liens. When sections 2 and 3 of the lien law are read together, as component parts of one law, their fair construction is that any of the persons designated in the latter section may acquire a lien for the purposes therein named, and that the term "real property" shall not only include real estate, lands, tenements, hereditaments, corporeal and incorporeal, and fixtures, but in addition thereto all bridges and trestle-work and structures connected therewith for the use of railroads. In making this specific reference to a certain class of railroad structures the legislature seems to have intended to remove them from the realm of uncertain classification and place them unmistakably in the general category of real property. This view of the statute seems to be strengthened, rather than weakened, by the provision of section 6 of the lien law, which gives to any person who shall perform any labor for a railroad corporation a lien for the value of such labor upon its railroad track, rolling stock, land and appurtenances, by complying with the provisions of the act. It would be quite unreasonable, we think, to impute to the legislature an intention to give a general laborer for a railroad corporation a lien upon all of its property, and to deprive one whose labor and material goes into the building of a railroad of the right to any lien unless he happens to have performed labor or furnished material for one or more of its bridges, trestles or structures connected therewith.

It was clearly the intention of the legislature in enacting the present general lien law to assimilate and harmonize as [316] far as possible the entire law embraced in the subject into a complete and harmonious statute, the various provisions of which should be held to relate to all mechanics' liens affecting all real property, whether public, semi-public or private, unless the language of the act evidences a different intent, or where from the nature of the subject the regulations as to one class are inapplicable to another: Brace v. City of Gloversville, 167 N. Y. 452, 60 N. E. 779. If this was the purpose of the statute, there is no force in the respondent's argument to the effect that because a railroad company is a quasi public corporation, the construction and operation of which are for the public use and benefit, the ordinary lien laws which give to mechanics and materialmen a lien upon buildings constructed by them are not to be considered to extend to the roadway and other property of a railroad corporation essential to the operation and maintenance of its road, except when express provision is made therefor. As we have already stated, it is not apparent why the legislature should give to the general employés of a quasi public corporation a lien upon all of its property, and at the same time deny to one whose labor or material has contributed to the construction of the road any lien except for such labor and materials as form part of a few specially enumerated structures.

It follows, therefore, that such part of the judgments below as dismissed the complaint of the appellant, the Schaghticoke Powder Company, should be reversed, and, as the facts are not disputed, judgment absolute is ordered in favor of such appellant, with costs in all courts.

Cullen, C. J., Gray, O'Brien, Bartlett and Vann, JJ., concur.

Haight, J., dissents.

Judgment accordingly.

Explosives Furnished for and Used in blasting rock in tunnels and in grading a railroad are "materials," for which the materialman is entitled to a lien: Hercules Powder Co. v. Knoxville etc. R. R. Co., 113 Tenn. 382, 106 Am. St. Rep. 836.

DELANEY v. FLOOD.

[183 N. Y. 323, 76 N. E. 209.]

INJUNCTION Against Interference by the Police with an Alleged Disorderly House.—Equity will not intervene to restrain the police authorities from stationing officers outside a place having a liquor tax certificate, when such authorities suspect that the place is being conducted as a disorderly house; and from informing customers who are in the place and those who are about to enter that it is a disorderly house which is likely to be raided at any moment, and that those on the premises at the time of such raiding are liable to arrest. (p. 763.)

Suit by the plaintiff, the possessor and proprietor of what is commonly known as a "Raines Law Hotel," at 54 Rivington street, New York City, against the defendant, a captain of police, to restrain him from stationing police officers in front of the premises and from interfering with persons about to enter, and also to recover damages on the ground that the defendant's action constituted an unlawful interference with plaintiff's rights and business.

During the pendency of the action application was made for an injunction to restrain defendant from doing the acts complained of, and upon the hearing of the application for the injunction the question whether plaintiff's premises were conducted as a disorderly house frequented by lewd women was contested upon conflicting affidavits. The special term denied the application in so far as it sought to restrain the posting of police officers in front of plaintiff's premises, but nevertheless enjoined the defendant and all officers and agents under his control "from in any manner stopping any persons who may desire to enter the premises known as No. 54 Rivington street in the Borough of Manhattan, city of New York, or voluntarily informing them or any person that the hotel conducted therein is a disorderly place, or that it is likely to be raided by the police department of the city of New York, or that if a raid should be made upon said premises any person found therein at the time would be liable to arrest, or by interfering in any other way by voluntary statements as to the character of said premises, or threats of possible raids to be made in or upon them, or by interfering with any person they may see going into said premises, or by informing any person they may see going into said premises, or any person in or upon said premises, that the said premises is a house of prostitution or notorious to the community, or is liable to be raided,

or in any way interfering with said premises by voluntary statements as to its character or possible raids."

This order was affirmed by the special term, which then certified the following questions for the determination of the court of appeals:

1. "Have the police authorities the power to station policemen outside of a place which has a liquor tax license, and which they suspect of being a disorderly house, and to notify customers who are in the place, and those who are about to enter the premises, that the place is a disorderly house, and as such is likely to be raided by the police at any moment, and that those who are in the place at the time of the raid are liable to arrrest?"

2. "Do such acts constitute a trespass?"

3. "If so, will equity intervene to restrain such acts?"

John J. Delaney, corporation counsel, Theodore Conoly and Terence Farley, for the appellant.

No appearance for the respondent.

[326] WERNER, J. The three questions certified to us, when considered separately, cannot be answered categorically; but when they are reduced in terms to the concrete and practical issue involved, they present a question of substantial importance that should be decided without regard to mere matters of form. The question, in substance, is whether equity will intervene to restrain the police authorities from stationing officers outside of a place having a liquor tax certificate, when such authorities suspect that place of being conducted as a disorderly house; and from notifying customers who are in the place and those who are about to enter the same that it is a disorderly house which is likely to be raided at any moment, and that those who are on the premises at the time of such raid are liable to arrest.

The pivotal point around which this question revolves is, that the plaintiff is engaged in the sale of intoxicating liquors. That is a business which, when uncontrolled and unregulated by law, is fraught with grave dangers to the public peace, health, morals and safety; and even when regulated by statute, as far as it may be, it is productive of much idleness, pauperism, disorder and crime. In order to prevent and to minimize these evils, as far as possible, it has been deemed necessary for the welfare of society that the business of liquor

selling should be hedged about by conditions and restraints from which other callings may be safely exempted. Under the law of our state one of these conditions is that no one shall be permitted to carry on that business without a liquor tax certificate duly issued by the proper authorities; and another is that "no person, either as owner or agent, shall permit any place where the traffic in liquors is carried on to become disorderly": Liquor Tax Law, sec. 23, subd. 9.

327 To effectuate this command of the law, "All officers authorized to make arrests in any city may, in the performance of their duties, enter upon any premises where the traffic in liquors is carried on or liquors are exposed for sale at any time when such premises are open." The defendant was concededly an officer having authority to make arrests in the city of New York, and as a member of the police force in that municipality it was his duty "at all times of day and night to especially preserve the public peace, prevent crime, detect and arrest offenders, ... carefully observe and inspect all places of public amusment, all places of business having excise or other licenses to carry on any business; all houses of ill-fame or prostitution, and houses where common prostitutes resort or reside, ... and to repress and restrain all unlawful and disorderly conduct or practices therein; enforce and prevent the violation of all laws and ordinances in force in said city": New York Charter, Laws 1901, 466, sec. 315.

The substance of the allegations of the complaint and the affidavits upon which the injunction herein was granted is that the plaintiff is conducting a lawful business in a proper manner, and that the defendant has maliciously, oppressively and unlawfully interdicted his business in the particulars set forth and restrained by the injunction. Opposed to these allegations are the numerous affidavits presented by the defendant, containing specific and detailed statements which tend very strongly to show that there was abundant basis for the suspicion that the plaintiff's "hotel" was a place in which disorderly practices prevailed. But we are not now concerned with the truth or falsity of these conflicting assertions. They are referred to merely for the purpose of showing that, upon the point which is determinative of the question whether the defendant acted lawfully or otherwise, there is a sharp controversy of fact. If the plaintiff did in fact maintain a disorderly place, it was the defendant's right, if it was not his

duty, to warn persons about to enter against becoming participators in plaintiff's violation of the law. The [328] whole question whether the acts of the defendant and his inferior officers were legal or not depends entirely upon the character of this so-called hotel. This basic question should not be determined in a court of equity upon affidavits, but in a court of law and by evidence that is tested and scrutinized according to the settled rules. In a case quite similar in principle, although different in its facts (Davis v. Am. Society for the Prevention of Cruelty to Animals, 75 N. Y. 362), this court has held that a court of equity is not the place for the trial of such a question. There the plaintiff was engaged in the business of slaughtering hogs in the city of New York. The president of the defendant society was an officer authorized to make arrests, and he went upon the premises of Davis, threatening him and his employés with arrest unless they would discontinue their method of killing hogs, which was claimed to be unnecessarily cruel. The action was in equity to restrain the defendant, its officers and agents, from making such arrests. At the trial the plaintiff adduced evidence which strongly tended to show that his method of slaughter was not unnecessarily cruel. Notwithstanding this evidence the complaint was dismissed, and, upon appeal to this court, it was held that the case made by the pleading and proofs was not one of equitable cognizance. In speaking for this court upon that question the late Judge Earl said: "A person threatened with arrest for keeping a bawdy-house, or for violating the excise law, or even for the crime of murder, upon the allegation of his innocence of the crime charged, and of irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is damnum absque injuria, unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risk of such damage by being a member of an organized society, and his compensation for such risks may be found in the general [329] welfare which society is organized to promote. This action is absolutely without sanction in the precedents or principles of equity."

If equity will not intervene in behalf of a concededly lawful business of a fixed and unchanging character, to prevent the

criminal prosecution of some alleged unlawful act in its conduct, how can such intervention be justified in a case where the business itself, even when lawfully conducted, exists by mere sufferance of law, or where it is of such a character that it may be lawful or unlawful at the will of him who conducts it? Such a situation as is presented in the case at bar is one which, in its very nature, cannot be adequately dealt with by a court of equity. What might be a trespass at one instant of time may be a perfectly justifiable and necessary act at another. Here lies the fundamental distinction between the case at bar and that class of cases in which equity assumes jurisdiction to restrain trespasses that are continuous or permanent in their nature, and where such relief is necessary to obviate multiplicity of actions at law and to prevent continuity of wrong. This case is also intrinsically unlike the cases of which People v. Marr, 81 N. Y. 463, 106 Am. St. Rep. 562, 74 N. E. 431, is a type, in which the "strikers" have been enjoined against interference with a lawful business by unlawful "picketing." The whole subject may be briefly summed up in the statement that we see nothing in the case at bar to take it out of the ordinary rule that equity will not interfere to prevent the enforcement of the criminal law. If the plaintiff has been oppressed and injured by any unlawful act of the defendant, he may invoke the Penal Code (section 556), or he may have an action at law for his damages.

The orders of the special term and appellate division should be reversed and injunction vacated. The third question certified is answered in the negative. The first and second are not answered. Costs to the appellant in all the courts.

Cullen, C. J., Gray, Bartlett, Haight and Vann, JJ., concur.

O'Brien, J., not voting.

Orders reversed, etc.

Police Surveillance of a supposed gambling resort will not be enjoined at the suit of one who has places of business in the same building, on the ground of injury to his business: Queen City Stock etc. Co. v. Cunningham, 128 Ala. 645, 86 Am. St. Rep. 164.

CASES

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

LATHAM v. ROANOKE RAILROAD AND LUMBER COMPANY.

[139 N. C. 9, 51 S. E. 780.]

VESTED REMAINDERMEN—Remedies Against Waste.—The owner of an inheritance, either by way of reversion or vested remainder, may sue for waste and recover the damage to the inheritance. (p. 765.)

CONTINGENT REMAINDERMEN—Remedies Against Waste. One entitled to a contingent remainder cannot maintain an action to recover damages for waste, such as the cutting of timber, but he may have his interest in the timber protected by an injunction. (p. 765.)

REMAINDERS—Whether Contingent or Vested.—If land is devised to a daughter for life, to go, after her death, to her "children and the children of such as are dead," and, while the life tenant is still living, one of her children dies, the children of such decedent have merely a contingent remainder. (p. 766.)

Action by Thomas H. Latham and others against the Roanoke Railroad and Lumber Company for the value of timber cut. The land from which the timber in controversy was cut was devised by William Alsbrook to his daughter, Sabra Harrison, for life, the will concluding as follows: "And after her death the said land and negroes are to go to the children of my said daughter and the children of such as are dead." Sabra Harrison, who is living, had several children, one of whom married B. D. Latham and died, leaving the plaintiffs as issue of the marriage. In 1892 a special proceeding was instituted in the superior court by Sabra Harrison and her then living children, including the mother of the plaintiffs, and the children of such as were deceased, to procure an or-

der to sell the timber on such land. At the sale the defendant purchased the timber, and the mother of the plaintiffs received their share of the purchase money. The plaintiffs were not parties to the proceeding. Mrs. Latham died prior to the commencement of this action. The plaintiffs sued for one-thirtieth of the value of the timber, found by the jury to be one hundred and fifty-nine dollars, less forty-three dollars and sixty-five cents, the value of the life estate of Mrs. Harrison. His honor, being of the opinion that the plaintiffs were not entitled to recover, rendered judgment accordingly, and they appealed.

H. S. Ward, for the plaintiffs.

A. O. Gaylord, for the defendant.

[10] CONNOR, J. The plaintiffs having neither the possession nor the right thereto cannot maintain an action for trespass. The authorities cited by their counsel in his well-considered brief amply sustain the right of the owner of the inheritance, either by way of reversion or vested remainder, to sue for waste and recover the damage to the inheritance: Burnett v. Thompson, 51 N. C. 210; Wall v. Williams, 91 N. C. 477; Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270. It is equally well settled that one entitled to a contingent remainder cannot maintain an action to recover damages for waste: Hunt v. Hall, 37 Me. 363. That was "an action on the case in the nature of waste." The land upon which the timber was cut was devised to the wife of the testator for life, remainder, "after her death," to the children of testator and "the heirs of such as may then be deceased." It was held that the plaintiffs, children of the deceased daughter, could not maintain the action during the life of the first taker. This case is cited with approval by Mr. Justice Walker in Bowen v. Hackney, 136 N. C. 193, 48 S. E. 633, 67 L. R. A. 440; Mayo v. Feaster, 2 McCord Eq. (S. C.) 137; 30 Am. & Eng. Ency. of Law, 2d ed., 275. The interest of a contingent [11] remainderman in the timber will be protected by a court of equity by injunction: University v. Tucker, 31 W. Va. 621, 8 S. E. 410. It therefore becomes necessary to consider and decide the question whether plaintiffs took, under the will, upon the death of their mother, a vested or contingent remainder. Their counsel contends that the mother took but a contingent remainder dependent upon her surviving the life

tenant. His view is thus clearly stated in his brief: "If one of the children of Sabra Harrison die before she does, the remainder is at an end and can never vest, and another remainder to her children is substituted who can take nothing from their parent but under the will." After further discussion he says: "It is made clear, we think, that the time at which the limitation should take effect in interest and not merely in enjoyment was at the death of Sabra Harrison. The will expressly says so." The authorities cited sustain his contention: Whitesides v. Cooper, 115 N. C. 570, 20 S. E. 295; Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633, 67 L. R. A. 440, in which the cases are cited and reviewed by Mr. Justice Walker; Irvin v. Clark, 98 N. C. 444, 4 S. E. 30; Hunt v. Hall, 37 Me. 363; Olney v. Hull, 21 Pick. 311. It being conceded that only those children of Mrs. Sabra Harrison who are living at the time of her death can take the land, why is it not equally true that only those of her grandchildren who are living at that time can take under the will, and that until such time the remainder is contingent? How is it to be known until that time whether the plaintiffs, or any of them, will ever take any estate in the land? If all recover the value of the timber, and one or more of them die before the death of Mrs. Harrison, is it not manifest that such as may die before her death have never sustained any damage by the act of defendant in cutting the timber, what is to prevent those who may survive recovering the share which would have vested in those who have died? The death of either will disturb the share or proportion of the survivors. If all should die, it may be that as those who would, in that [12] event, take were parties to the special proceeding, they would not be entitled to recover for the share which would have accrued to plaintiffs. Without deciding any of these questions, it is clear that plaintiffs, during the life of Mrs. Harrison, have but a contingent remainder which may never vest. The plaintiffs' counsel insist that although they have sought to recover only one-thirteenth of the value of the timber upon the theory that plaintiffs will, at the death of Mrs. Harrison, take by substitution the share which would have vested in their mother if she had survived, that they are in fact entitled to share equally, when the life estate falls in, with all of the children and grandchildren upon a per capita basis of division. If he is correct in this view it is manifest that they may not recover in this action, for it is impossible

to say now what amount they may then be entitled to. No one can foresee how many deaths may occur during Mrs. Harrison's life, or how such deaths would affect the rights of the plaintiffs if they survive her. It is possible that by the death of several of the children, leaving a number of grandchildren, the share upon a per capita division would be materially diminished. These are contingencies which obstruct the plaintiffs' right to recover in this action. It would seem, therefore, that for the purpose of disposing of this appeal it is immaterial whether the plaintiffs, or such of them as may then be in esse, will, upon the death of Mrs. Harrison, take by substitution or per capita. The question is not free from difficulty. As the conclusion to which his honor arrived puts an end to this action, it is not necessary to decide the other interesting questions discussed by counsel.

The judgment of his honor must be affirmed.

The Rights and Remedies of Remaindermen are discussed in the monographic note to Allen v. De Groodt, 14 Am. St. Rep. 628-639. That a remainderman or reversioner may have an injunction against waste by the life tenant, see Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891; Learned v. Ogden, 80 Miss. 769, 92 Am. St. Rep. 621. As to the distinction between vested and contingent remainders, see Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Chapin v. Crow, 147 Ill. 219, 37 Am. St. Rep. 213; L'Etourneau v. Henquenet, 89 Mich. 428, 28 Am. St. Rep. 310.

Injunctions Against the Cutting of Timber are discussed in the monographic note to Moore v. Holliday, 99 Am. St. Rep. 748; and in the recent case of Doke v. Peek, 45 Fla. 244, 110 Am. St. Rep. 70.

WILKINS v. NORMAN.

[139 N. C. 40, 51 S. E. 797.]

DEEDS—Repugnant Clauses.—If an estate in fee is given to a grantee in both the premises and the habendum of the deed, and the warranty is in harmony with the preceding parts of the instrument, but following the warranty two entirely new clauses, both repugnant to the estate conveyed, are introduced, such clauses are void. (p. 768.)

DEEDS.—If There are Two Repugnant Clauses in a deed, the first will control and the last be rejected. (p. 769.)

DEEDS—Rules of Construction—Intention of Grantor.—Although courts in construing a deed seek for the intention of the grantor by an examination of the entire instrument, and effectuate his intention when found, nevertheless it is their duty, when rules of construction have been settled, to enforce them, otherwise titles are rendered uncertain and insecure. (pp. 769, 770.)

A. O. Gaylord, for the plaintiffs.

H. S. Ward, for the defendant.

[40] CONNOR, J. Benjamin Phelps, on October 2, 1872, executed a deed conveying the land in controversy to Berrick Norman. Following the recital of the consideration, etc., the deed contains the usual operative words of conveyance, "unto the said Berrick Norman, to him and his heirs and assigns forever," etc. "To have and to hold the said land and premises above described to him the said Berrick Norman, to him, his heirs and assigns free, and discharged of any and all encumbrances in fee simple forever." Following the usual covenant of warranty are the words "and after the death of Berrick Norman and Moseller Norman, his wife, the lands and premises to descend to their heirs, Lad Wilkins, [41] Ellick Wilkins and Susan Norman, and to be equally divided between the three heirs above mentioned." Berrick Norman and his wife, named in the deed, are dead. The plaintiffs are the same persons named in the last clause of the deed. The defendant is in possession. His honor, upon the foregoing facts, was of opinion that plaintiffs were not entitled to recover and rendered judgment accordingly. Plaintiffs appealed.

We concur with his honor. The entire estate, in unmistakable terms, is given the grantee both in the premises and the habendum. The warranty is in harmony with the preceding parts of the deed; following the warranty there are introduced two entirely new clauses, both repugnant to the estate and interest conveyed. It is sought to make the wife of the grantee a tenant in common and limit the estate to the life of the grantee and his said wife and the survivor, giving, by way of remainder, the fee which had already been conveyed to the grantee to the plaintiffs. The principle upon which such repugnant clauses in deeds have been disposed of by this court, following the most approved text-writers, is thus stated by Daniel, J., in Hafner v. Irwin, 20 N. C. 570, 34 Am. Dec. 390: "In the case before us the whole interest in the property is granted and conveyed to the plaintiff in the premises of the deed. The same interest being afterward limited in the habendum to Curry makes that part of the deed repugnant to the premises, and therefore void."

That case was cited with approval by Faircloth, C. J., in Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676, say-

ing: "In the premises, the fee is conveyed to the plaintiff, and afterward a life estate to the defendant in the same lands. If the first [42] intent, expressed in apt language and repeated in the warranty clause, is to be observed, then there is nothing left to satisfy the intent in the last clause." It is an elementary maxim that when there are repugnant clauses in a deed, the first will control and the last be rejected. In the case of Blair v. Osborne, 84 N. C. 417, it will be noted that the introduction of the children in the habendum did not affect the estate or interest conveyed in the premises. Judge Ashe says that it is clear that the mother, grantee, took only a life estate by the language in the premises. It was sought to so construe the habendum that the children, introduced for the first time, should be adjudged tenants in common with her. This the court declined to do, but permitted the children to take in remainder after the expiration of the mother's life estate. In our case the plaintiffs can take only by rejecting the words of inheritance in the premises and habendum, thus cutting down the estate of the grantee from a fee simple to a life estate. The authorities are uniform that this cannot be done. The learned counsel for the plaintiff cites Rowland v. Rowland, 93 N. C. 214. In his well-considered opinion, Mr. Justice Ashe puts our case, saying: "Blackstone, in his Commentaries, volume 2, page 298, has said that the office of the habendum is to lessen, enlarge, explain or qualify the premises, but not to contradict or be repugnant to the estate granted in the premises. And to illustrate what is meant by the repugnancy which will render the habendum nugatory, he puts the case where, in the premises, the estate is given to one and his heirs, habendum to him for life, for an estate of inheritance is vested in him before the habendum comes, and shall not afterward be taken away and devested by it." The deed in that case upon which the decision is based is essentially different from ours. We have considered the case upon the assumption that the clause under which plaintiffs claim contains apt words to convey an estate in remainder. This, however, is by no means clear. While we are advertent to the [43] general rule that the court will, by an examination of the entire deed, seek, and, if found, effectuate the intention of the grantor, we must keep in view the other rule that when rules of construction have been settled, it is the duty of the court to enforce them, otherwise titles are rendered uncertain and insecure. Merrimon, J., in

Leathers v. Gray, 101 N. C. 162, 9 Am. St. Rep. 30, 7 S. E. 657, gives expression to the principle and the reason upon which it is based. "When a testator employs words and phrases to express his intention in the disposition of his property, by will, that have a well-known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall, in some appropriate way, to some extent to be seen in the will, have qualified or used them in a different sense. And so, also, if the use of such words bring his attention so expressed within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intention of the testator. Otherwise technical words would have no certain meaning or effect, and the rule of law would be subverted in order to effectuate the real intention of the testator, unexpressed or imperfectly expressed. It is said, however, that the real intention of the testator must have effect, and so it must, but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it."

The judgment must be affirmed.

REPUGNANT CLAUSES IN DEEDS.

I. Intention of Parties.
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d. Covenants and Granting Clause, 776.
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I. Intention of Parties.

a. Controlling Effect in General.—The strictness of the ancient doctrine as to repugnancy in deeds has been very considerably relaxed: McWilliams v. Ramsay, 23 Ala. 813. Courts have, practically with unanimity, come to the conclusion that the intent of the grantor is the guiding star in the interpretation of deeds; and his intent is

not to be concluded by any one clause or provision separately considered, but is to be ascertained by taking and reading the instrument by its four corners, so as to make all its parts harmonious rather than inconsistent or repugnant: Spurrier's Heirs v. Parker, 55 Ky. (16 B. Mon.) 274; Moore v. Griffin, 22 Me. 350; Waterman v. Andrews, 14 R. I. 589; Cravens v. White, 73 Tex. 577, 15 Am. St. Rep. 803, 11 S. W. 543; Hubbird v. Goin, 137 Fed. 822. The intention of the grantor, as it appears from the whole instrument, should prevail over technical words and technical rules of construction, for the intent, and not the words, is the essence of every agreement; and the only valid purpose of construction and rules thereof is the ascertainment of such intent: Atkins v. Baker, 112 Ky. 877, 66 S. W. 1023; Hall v. Wright, 27 Ky. Law Rep. 1185, 87 S. W. 1129; Jackson v. Myers, 3 Johns. 383, 3 Am. Dec. 504; Uhl v. Ohio River R. R. Co., 51 W. Va. 106, 41 S. E. 340.

b. Rejection of Words Inconsistent Therewith.—And when the intention is clear, parts of the deed inconsistent therewith may be rejected: Emerson v. White, 29 N. H. 482; Eastman v. Knight, 35 N. H. 551; State v. Trask, 6 Vt. 355, 27 Am. Dec. 554. Repugnant words must yield to the purpose of the grant, when such purpose is clearly ascertained from the premises of the deed, although such words stand first in the grant: Flagg v. Eames, 40 Vt. 16, 94 Am. Dec. 363; Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 266. Courts are very reluctant, however, to reject one clause in a deed because inconsistent with another one, and they do not adopt an interpretation requiring such rejection, except from unavoidable necessity: Alton v. Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Bush v. Watkins, 14 Beav. 425.

"In the case of repugnant dispositions of the same property contained in the same instrument, the courts are from necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made. If it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon, and interpretations of, the literal signification of the language used must be imposed, as will give some effect, if possible, to all the provisions of the deed": Coleman v. Beach, 97 N. Y. 545, 553.

II. General and Specific Terms.

In the construction of deeds, it is a general rule that, as between contradictory words, those more specific and particular will control those more general. Thus, if the land is described by a general and a particular description, the particular description will ordinarily govern and the other will be rejected as false: Carter v. Chevalier, 108 Ala. 563, 19 South. 798; Holmes v. Martin, 10 Ga. 503; Gano v. Aldridge, 27 Ind. 294; Smith v. Strong, 31 Mass. (14 Pick.) 128; Dawes v. Prentice, 33 Mass. (16 Pick.) 435; Guffey v. O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; Barnard v. Martin, 5 N. H. 536; Whee-

lock v. Moulton, 15 Vt. 519. However, general words are not restrained by restrictive words added, where such words do not clearly indicate the intention and designate the grant: Field v. Huston, 21 Me. 69. The real intent is to be gathered from the whole description, particular as well as general: Brunswick Sav. Inst. v. Crossman, 76 Me. 577. The intention of the parties as gathered from the whole instrument, will control; and in case of a general description followed by a clause summing up the intention of the parties as to the premises conveyed, it has a controlling effect upon all the prior phrases used in the description: Plummer v. Gould, 92 Mich. 1, 31 Am. St. Rep. 567, 52 N. W. 146.

"If the whole description in a deed, taken together, cannot stand, then general words and sweeping clauses which are inconsistent with other specific and particular portions of the grant are to be disregarded. The rule is of general application, that when a deed defines with reasonable certainty the estate or interest which was intended to pass, a subsequent addition to the description of general words which cannot be reconciled with preceding clauses, is to be considered as having been inserted by mistake, and is to have no effect on that part of the deed which is capable of a clear and definite interpretation": Presbrey v. Presbrey, 95 Mass. (13 Allen) 281.

III. Relative Positions of Conflicting Clauses.

a. First Clause Controls Last.—Where two clauses in a deed are so inconsistent, contradictory or repugnant that they cannot be reconciled and both given effect, the technical rule is, that the first is to be received and the last rejected: Gould v. Womack, 2 Ala. 83; Petty v. Booth, 19 Ala. 633; Doe v. Porter, 3 Ark. 18, 36 Am. Dec. 448; Tubbs v. Gatewood, 26 Ark. 128; Havens v. Dale, 18 Cal. 359; Daniel v. Veal, 32 Ga. 589; Durand v. Higgins, 67 Kan. 110, 72 Pac. 567; Cutler v. Tufts, 20 Mass. (3 Pick.) 272; Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676; Green Bay etc. Canal Co. v. Hewitt, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382. This rule does not apply unless reconcilement is impossible: Waterman v. Andrews, 14 R. I. 589; and it is said not to apply to a repugnance between parts of the same clause: Zittle v. Weller, 63 Md. 190. There is no rule that, in case of a repugnancy between clauses describing the land, the first necessarily prevails over the last: Rathburn v,. Geer, 64 Conn. 421, 30 Atl. 60.

b. Modification of this Rule.—In fact, we do not understand that the courts of the present day feel bound, in any case, to give effect to the first of two repugnant parts of a deed merely because of its position in the instrument, but rather that they will give effect to the one, be it first or last, which appears, from an examination of the whole deed, most in harmony with the purpose of the grant and the intention of the parties. The intention of the parties, not the relative positions of the inconsistent clauses, is the important consideration: Phillips v. Collinsville Granite Co., 123 Ga. 830, 51

S. E. 666; Palmer Oil etc. Co. v. Blodgett, 60 Kan. 712, 57 Pac. 947; Atkins v. Baker, 112 Ky. 877, 66 S. W. 1023; Utter v. Sidman, 170 Mo. 284, 70 S. W. 702; Flagg v. Eames, 40 Vt. 16, 94 Am. Dec. 363. In this last case it is decided that repugnant words must yield to the purpose of the grant, when such purpose is clearly ascertained from the premises of the deed, though such words stand first in the grant. This decision is approved in Goldsmith v. Goldsmith, 46 Va. 426, 33 S. E. 266.

c. **Relative Positions Immaterial.**—The language of the opinion in Utter v. Sidman, 170 Mo. 284, 70 S. W. 702, is instructive in this connection. "Numberless other cases could be cited bearing upon the questions here involved," said the court after a review of some of the authorities, "but the foregoing are sufficient to illustrate the intricacies, the pitfalls, and the obstacles that the conveyancers of olden times encountered, and that the courts had to grapple with. They are interesting and instructive, but are not all-controlling nowadays. Then great care was observed to confine to each part of a deed its assigned function. The several parts of the instrument were given an importance and controlling meaning, and the place in the instrument where the meaning of the grantor was to be expressed was considered of the gravest importance. The premises included all that was contained in the deed preceding the habendum, and embraced the names of the parties, such recitals as were deemed necessary, the consideration, and the description of the property. Then followed the habendum, the tenendum, the reddendum, the conditions, the warranty, the covenants, and the conclusion: 1 Devlin on Deeds, 2d ed., sec. 176. No one provision was allowed to impinge on the province of another. The general rule was that, 'if there be a repugnancy the first words in a deed and the last words in a will shall prevail.' In short that a grantor might convey as he pleased, and his intention would be observed by the courts, but with this qualification: that he must express his intention in set and technical language, and at the proper places, and in the right order and clause of the deed. Failing to do so, the courts did not feel called on to bother about his intention, but took what he said first as expressing conclusively his intention, and discarded everything else as void for repugnancy. Such a rule of construction made it almost impossible for anyone except a very expert conveyancer to draw an instrument that would stand the test of the rule, and likewise made it very easy for the courts in construing complicated instruments; but it is not so clear that the real intention of the grantor was ascertained or effectuated. The modern rule, which prevails in this state, is much simpler, and much more calculated to carry out the wishes of the grantor. The intention of the grantor, as gathered from the four corners of the instrument, is now the pole star of construction. That intention may be expressed anywhere in the instrument, and in any words—the simpler and plainer the better—that will impart it; and the court will enforce it no matter in what part of the instrument

it is found.'' This case was followed in Miller v. Dunn, 184 Mo. 318, 105 Am. St. Rep. 537, 83 S. W. 436.

IV. Clauses Which are in Conflict.

a. Premises and Habendum.

1. **Premises Control Habendum.**—Since every part of a deed should be compared with every other part, so as to obtain the sense of the entire instrument, the premises and the habendum should be construed together, and, if possible, they should be made to harmonize; but if irreconcilable differences are found to exist between them, and both cannot stand together, it is a rule of construction that the premises shall prevail. The word ''premises,'' in this connection, means or includes everything in a deed which precedes the habendum: Eldridge v. See Yup Co., 17 Cal. 44; Palmer v. Cook, 159 Ill. 300, 50 Am. St. Rep. 165, 42 N. E. 796; Chamberlain v. Runkle, 28 Ind. App. 599, 63 N. E. 486; Lamb v. Medsker, 35 Ind. App. 662, 74 N. E. 1012; Ballard v. Louisville etc. R. R. Co. (Ky.), 5 S. W. 484; Berry v. Billings, 44 Me. 416, 69 Am. Dec. 107; Budd v. Brooke, 3 Gill (Md.), 198, 43 Am. Dec. 321; Foreman v. Presbyterian Assn. (Md.), 30 Atl. 1114; Smith v. Smith, 71 Mich. 633, 40 N. W. 21; Major v. Bukley, 51 Mo. 227; Donnan v. Intelligencer Printing etc. Co., 70 Mo. 168; Brown v. Manler, 21 N. H. 528, 53 Am. Dec. 223; Hafner v. Irwin, 20 N. C. (4 Dev. & B.) 570, 34 Am. Dec. 390. In other words, if the granting clause and the habendum are irreconcilable, and it does not appear from the other parts of the instrument which is intended to be controlling, the granting clause will prevail; for the reason that a granting clause, or its equivalent, is indispensable to a conveyance, whereas an habendum is not indispensable for any purpose whatever: Ratcliffe v. Marrs, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876; Hall v. Wright, 27 Ky. Law Rep. 1185, 87 S. W. 1129.

''The habendum, like any other part of the deed, may be examined in construing the instrument so as to effectuate the intention of the parties; yet it is not an absolutely essential part of the deed, and in modern conveyancing is being abandoned and quite generally becoming obsolete. If the grant or premises in the deed contain words of limitation, nothing remains for the habendum to accomplish, and it may be disposed with. So unimportant is the habendum that, if repugnant to the limitation appearing in the premises, it will be ineffectual to control the premises; and it may be rejected entirely when repugnant to or inconsistent with other clauses of the deed'': Hunter v. Patterson, 142 Mo. 310, 44 S. W. 250. ''The habendum may lessen, enlarge, explain or qualify, but not totally contradict or be repugnant to, the estate granted in the premises'': Durand v. Higgins, 61 Kan. 110, 72 Pac. 567.

2. **Modification of this Rule.**—The repugnancy between the premises and the habendum, in order to defeat the habendum, must be such

that the intention of the parties either cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect. If from the entire instrument and the attending circumstances it appears that the grantor intended to enlarge, restrict, or even repugn the conveyancing clause, the habendum will control. It is then to be regarded as an addendum or proviso to the granting clause, which will control it even to the extent of destroying its effect. In short, the modern rule requires the consideration of the deed as a whole, and not in separate and distinct parts, as was formerly done, and the finding of repugnancy avoided whenever all the provisions of the instrument may, without ignoring the accepted canons of construction, be given force and effect. Courts now endeavor to ascertain the intention of the parties to a deed from a consideration of the entire language of the instrument, rather than from the relative positions of its different parts and clauses: Whetstone v. Hunt (Ark.), 93 S. W. 979; Faivre v. Daley, 93 Cal. 664, 29 Pac. 256; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049; Beedey v. Finney, 118 Iowa, 276, 91 N. W. 1069; Palmer Oil etc. Co. v. Blodgett, 60 Kan. 712, 57 Pac. 947; Chicago Lumbering Co. v. Powell, 120 Mich. 51, 78 N. W. 1022.

Bodine's Admr. v. Arthur, 91 Ky. 53, 34 Am. St. Rep. 162, 14 S. W. 904, is a leading case on this question, and the following is an extract from the opinion therein: "It is contended that the conveyancing clause and the habendum are repugnant to each other; consequently, the latter must yield. It is undoubtedly true that in case of repugnancy between the two and it cannot be determined from the whole instrument and attendant circumstances, with reasonable certainty, that the grantor intended that the habendum should control, the conveyancing clause must, in that case, control, for the reason that words of conveyance are necessary to the passage of the title, and the habendum is not ordinarily an indispensable part of a deed; hence, in the case above indicated, the conveyancing clause must control; but where it appears from the whole conveyance and attending circumstances that the grantor intended the habendum to enlarge, restrict, or repugn the conveying clause, the habendum must control. It is, in such case, to be considered as an addendum or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause or premises, even to the extent of destroying the effect of the same. This is so because it is the last expression of the grantor as to the conveyance, which must control the preceding expression."

The technical rule that an habendum which is repugnant to the granting clause must be rejected is said not to apply in the construction of statutory deeds: Adams v. Fisher (Mich.), 107 N. W. 705; citing Welch v. Welch, 183 Ill. 237, 55 N. E. 694.

b. Recitals and Operative Words.—Mere recitals in a deed cannot ordinarily control the plain words of the granting clause: Huntington v. Havens, 5 Johns. Ch. 23. Recitals as to the inducement

or purpose of a grant, if irreconcilable with the operative words of the deed, must generally yield to the latter: Miller v. Board of Supervisors, 67 Miss. 651, 7 South. 429; Dunbar v. Aldrich, 79 Miss. 698, 31 South. 341, citing Bailey v. Lloyd, 5 Russ. 344; Young v. Smith, 35 Beav. 90; Walsh v. Trevanion, 69 Eng. Com. L. 750. "Where a deed contains all the necessary words for a conveyance of the fee, and shows an intention to convey the fee, a clause in the deed indicating the motive or purpose of the conveyance will not limit its effect as a conveyance of the fee": Bodwell Granite Co. v. Lane, 83 Me. 168, 21 Atl. 829. The granting portion of a deed, which passes all of the estate of the grantor, cannot be diminished by a mere recital in the description: Tate v. Clement, 176 Pa. St. 550, 35 Atl. 214.

c. **Reservations, Exceptions, and Conditions** in a deed which are clearly repugnant to the granting clause and which tend to diminish or destroy the estate or interest previously granted, are, as a rule, void: Pynchon v. Stearns, 11 Met. 312, 45 Am. Dec. 210; McDaniel v. Puckett (Tex. Civ. App.), 68 S. W. 1007; Riddle v. Town of Charlestown, 43 W. Va. 796, 28 S. E. 831. This rule applies, however, only where the repugnancy is such that the intention of the parties cannot be ascertained from the whole instrument, or if ascertained, cannot be given effect in accordance with the established principles of law: Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984. If the habendum clause in a deed contains an exception which is not referred to in the granting clause, the exception is not void for repugnancy, if it clearly appears that it is the intention of the parties to make such exception: Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. If the general words of a grant are limited by an exception, the exception is not void for repugnancy: Elsea v. Adkins, 164 Ind. 580, 108 Am. St. Rep. 320, 74 N. E. 242. And a reservation cannot be regarded as repugnant and void, when the grantee, if it is permited to be effectual, may acquire a valuable interest in the thing granted: Gay v. Walker, 36 Me. 54, 58 Am. Dec. 734.

d. **Covenants and Granting Clause.**—The covenants of a deed are not usually used to enlarge the estate granted in the premises, but they may properly be resorted to for the purpose of aiding the interpretation of the conveying part of the instrument: Corbin v. Healy, 37 Mass. (20 Pick.) 514; Ross v. Adams, 28 N. J. L. 160; Mills v. Catlin, 22 Vt. 98. It has been held that where a deed conveys an estate in fee simple, a clause against liability for the debts of the grantee, being incompatible with the grant of the fee, is void: Ricks v. Pope, 129 N. C. 52, 39 S. E. 638.

e. **Descriptions of Land.**—When there are different descriptions of the land conveyed in a deed they will be harmonized, if possible; but if there is a clear repugnance between them, the court will, upon an examination of the language of the whole instrument, give

effect to that description which is most certain and definite, and which best comports with the intention of the parties and the circumstances of the case: Pico v. Coleman, 47 Cal. 65; Wade v. Deray, 50 Cal. 376; Benedict v. Gaylord, 11 Conn. 332, 29 Am. Dec. 299; Maryland Const. Co. v. Kuper, 90 Md. 529, 45 Atl. 197; White v. Gay, 9 N. H. 126, 31 Am. Dec. 224; Bell v. Sawyer, 32 N. H. 72; Proctor v. Pool, 15 N. C. (4 Dev.) 370; Miller v. Cherry, 56 N. C. (3 Jones Eq.) 24; Raymond v. Coffey, 5 Or. 132; Hitchler v. Boyles, 21 Tex. Civ. App. 230, 51 S. W. 648; Gibney v. Fitzsimmons, 45 W. Va. 334, 32 S. E. 189. A particular description will control a general one: Doe v. Porter, 3 Ark. 18, 36 Am. Dec. 448; Melvin v. Proprietors of Locks and Canals, 5 Met. 15, 38 Am. Dec. 384. And a description by metes and bounds controls one by quantity: Seeders v. Shaw, 200 Ill. 93, 65 N. E. 643; Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. The first description does not necessarily prevail over the last: Rathbun v. Geer, 64 Conn. 421, 30 Atl. 60; Singleton v. School Dist. (Ky.), 10 S. W. 793. In case of doubt, the court will incline to the description most favorable to the grantee: Esty v. Baker, 50 Me. 325, 79 Am. Dec. 616; Melvin v. Proprietors of Locks and Canals, 5 Met. 15, 38 Am. Dec. 384; McBride v. Burns (Tex. Civ. App.), 88 S. W. 394.

f. **Descriptions of Parties.**—In case of a repugnancy in a deed between the parties named in the premises and those named in subsequent parts of the instrument, the general rule, perhaps, is to allow the premises to control, unless a contrary intent is discoverable from the language of the entire deed: Hafner v. Irwin, 20 N. C. 570, 433, 34 Am. Dec. 390; Moore v. City of Waco, 85 Tex. 206, 20 S. W. 61; Blair v. Muse, 83 Va. 238, 2 S. E. 31. Where a deed, in the recital of the parties, refers to a man and his wife as parties of the second part, but in the granting and operative clauses refers to him alone, the conveyance may, if the inconsistency cannot be explained, be regarded as to the husband only: Boyerton Nat. Bank v. Hartman, 147 Pa. St. 558, 30 Am. St. Rep. 759, 23 Atl. 842. And when there is an obvious error in the initials of the grantee in one part of a deed, whereas they are correctly given in other parts, the erroneous initials will be rejected: Kansas City etc. Ry. Co. v. Smith, 156 Mo. 608, 57 S. W. 555.

HUGHES v. PEPER TOBACCO WAREHOUSE COMPANY.

[139 N. C. 158, 51 S. E. 793.]

GUARANTY—What is not.—A letter, written in reply to an inquiry as to the general standing of a third person, which reads: "We regard him as a perfectly reliable, trustworthy gentleman, with whom your samples and sales would be entirely safe, and doubly so as all tobacco of yours that might be shipped would come direct to our warehouse, and the payment of all such tobacco would be made by us to you for all sales," does not constitute a guaranty. (p. 778.)

F. S. Spruill and W. H. Ruffin, for the plaintiff.

T. W. Bickett and S. P. Galt, for the defendant.

158 CLARK, C. J. This action is upon an alleged guaranty, as proof of which the plaintiff relied upon the following letter:

"St. Louis, Mo., March 19, 1897.

"Messrs. W. T. Hughes & Co., Louisburg, N. C.

"Gentlemen: Your letter of the 11th inst., making inquiry about the general standing of J. E. M. Walker, received. We regard him as a perfectly reliable, trustworthy gentleman, with whom your samples and sales would be entirely safe and doubly so as all tobacco of yours that might 159 be shipped would come direct to The Peper Tobacco Warehouse Co., and the payment of all such tobacco would be made by us to you for all sales.

"Yours truly,

"NICHOLAS N. BELL, Manager,

"Per HALL."

Bell was manager of the defendant company. The defendant demurred, giving as its first ground that the letter did not constitute a guaranty, and hence the plaintiff's complaint did not set forth a cause of action, and the court below so held.

We do not think that this letter constituted a guaranty by the defendant to Hughes & Co. of payment of all tobacco which they should ship J. E. M. Walker. A guaranty is a contract—an aggregatio mentium. This letter is on its face merely a response to a letter of inquiry to ascertain the general standing of J. E. M. Walker, and not to a request for them to guarantee purchases made by him. The reply contains what was asked for—information, and nothing more.

This reply states that the defendant "regarded" Walker as a reliable and trustworthy gentleman, with whom Hughes & Co.'s samples and sales would be entirely safe, and doubly so because Hughes & Co.'s tobacco would come direct to the defendant's warehouse, and payment for all sales of such tobacco would be made by the defendant to the plaintiffs. This was merely a statement of the defendant's opinion of Walker's reliability and of the manner in which the defendant would handle the tobacco and the additional safety this method would be to the plaintiff. Besides, there was no consideration for the guaranty. The tobacco was already being shipped to the defendant for Walker, as it would seem from the letter, and there certainly is no agreement shown to so ship, nor an indication of any benefit to accrue to the defendant. Neither in the letter nor in the attendant circumstances is there anything to justify holding this letter to be a guaranty. The [160] purport of the letter depends upon its intent, as derived from its perusal; and cases cited upon the construction of other papers differently worded could be of no assistance to us.

As the letter is not a guaranty, it becomes entirely unnecessary to consider the other exceptions. The judgment sustaining the demurrer is affirmed.

Contracts of Guaranty are discussed at length in the recent monographic note to Pearsall Mfg. Co. v. Jeffreys, 105 Am. St. Rep. 502-526.

COZARD v. KANAWHA HARDWOOD COMPANY.

[139 N. C. 283, 51 S. E. 932.]

EMINENT DOMAIN—Public Use—Logging Road.—A statute authorizing owners of timber lands to condemn a right of way for tramways or railways for their exclusive use is unconstitutional. (p. 789.)

EMINENT DOMAIN.—Whether a Use is Public is for the ultimate decision of the courts. (p. 789.)

EMINENT DOMAIN.—If a Use is Public, the Expediency or Necessity for establishing it is exclusively for the legislature. (p. 790.)

Jones & Johnston and Shepherd & Shepherd, for the plaintiff.

Dillard & Bell, for the defendants.

283 CONNOR, J. Plaintiff alleged that he was the owner of a tract of land in Cherokee county, upon which he had erected a dwelling and planted a large number of fruit trees and made many other valuable improvements requiring outlay of many thousand dollars. That the defendants are partners conducting a general lumber business under the firm name and style of the Kanawha Hardwood Company. That defendants are threatening, and pursuant to such threats proceeded, to construct a 284 railway over and through his lands for the purpose of hauling timber and timber products from their own lands. That in grading the route for such railway and erecting trestles over the mountain great and permanent damage will be done his property, etc. He applied to the resident judge of the district for a restraining order until the hearing and a permanent injunction, etc. Upon the return day of the order to show cause, his honor, Judge Ferguson, upon hearing the complaint and answer supported by affidavits, found the following facts: The defendants, after notice, applied to the highway commission of Valleytown township, in said county, for a right of way to construct and operate a private railroad from the town of Andrews, a railroad station on the Southern Railway, to standing timber owned by the defendants in Graham county, which right of way would pass over the plaintiff's land. The plaintiff filed an answer to the petition. From the order the highway commission, finding that it was necessary, reasonable and just that the petitioners should have the right of way, and appointing a jury to lay it off, plaintiff appealed to the board of commissioners of Cherokee county. From the order of the said board of commissioners affirming the proceedings of the highway commission the plaintiff appealed to the superior court. The appeal is now pending in said court. That the defendants are the owners of standing timber from which no public road leads and to which no water is convenient; that the proposed road leads from a railroad station to such standing timber, and that such standing timber cannot be marketed with a profit to the defendants without the construction of a railroad. That the construction of a railroad is necessary for the profitable marketing of such timber, and that the route across the plaintiff's land is a reasonable route; that in taking such route no injustice is done the plaintiff; that there is no reason why his land should not be taken as well as the land of any others over which the

road might be constructed; that five [285] years will not be an unreasonable time in which to remove such standing timber.

Defendants have graded a considerable portion of the proposed road, not on the lands of the plaintiff, but other portions of the proposed route; they have bought and contracted for iron rails, locomotives and other appliances for operating said road.

Defendants are not a corporation, and do not propose to become liable as common carriers, but propose to construct and use the road for their sole and exclusive use in removing their timber and timber products from their lands in Graham county to the railroad station at Andrews and to the markets. There are other large boundaries of timber land of like kind contiguous to the defendants' timber. Defendants do not propose to transport over their proposed railroad such timber for reasonable charges to be fixed by the corporation commission or other authority of the state. Defendants do not claim any other right to enter upon plaintiff's land other than such as they acquired by the order of the highway commission. His honor, upon the foregoing facts, continued the injunction to the hearing. Defendants appealed.

The defendants insist that pending the proceeding instituted before the highway commission the court should not interfere by injunction with the construction of their proposed railway. This contention would be unanswerable but for the fact that plaintiff insists that in no point of view can the result of that proceeding affect his right to enjoin defendants, for that (1) no power is conferred upon the highway commission to order a [286] railway of the character or for the purpose contemplated by the defendants to be laid out; (2) that if the statute undertook to confer such power it would be invalid, violating the elementary principle that private property can only be taken for a public use, and then with compensation.

These contentions render it necessary to examine the provisions of the statute creating the highway commission of Valleytown township, chapter 210 of the Public Laws of 1905.

By the first section of the statute provision is made for electing three persons, who shall constitute the highway commission for said township, naming those who shall act until the time appointed for the first election. By the second section the commission is vested with the powers, rights, etc.,

exercised by the board of supervisors of public roads, etc. "They shall have full power and authority to order the laying out of public roads, etc. They shall also have power and authority to lay out cartways, rights of way for tramroads, church and mill roads, and to discontinue the same in the way and manner provided in sections 2033, 2056, 2057, 2062, 2063 of the Code, or any amendments thereof." It is clear that the highway commission established by the act has no larger or other power in regard to ordering cartways or tramways to be opened than is exercised by the boards having jurisdiction over such matters under the general public laws. It is equally clear that the road proposed to be opened and operated does not come within the definition of cartways provided by sections 2055-2057 of the Code. This right is conferred only on persons "settled upon or cultivating any land." The cartway authorized to be opened "shall be kept open for the free passage of all persons on foot or horseback, carts and wagons." Section 2057 provides that persons over whose lands cartways have been opened "may erect gates or bars across the same." The section was amended by chapter 46 of the Laws of 1887, by inserting in line 1, the words "or shall own any standing timber," and in lines 6 and 15, [287] between the words "cartway" and "to," the words "tram or railway." In line 18 striking out the word "way" and inserting the words "cartways established under this act." Section 2057 is amended by inserting in line 1 the words "tram or railways," and by inserting in line 6, between the words "just" and "and," the words "cartways, tramways, or railways for the removal of timber shall continue for a period not longer than five years, and in entering cultivated land shall protect the same by sufficient stock-guards." The effect of these amendments is to confer upon owners of land upon which there is any standing timber the right to have opened tramways or railways, with the exclusive use of them, confining to cartways the right of all persons to pass over them. The right to maintain such tramways or railways is confined to a period of five years, with the duty of erecting stock-guards when they pass through cultivated land, thus depriving the owner of the land through which such tram and railways pass, of the right to erect gates or bars across them. It appears that the highway commission ordered the laying out of a private way for a private railway through and over the plaintiff's

land, with such curves and grades as are necessary according to the survey made in order to reach the lowest gap on top of the mountain. Said right of way, when it extends through woodland, or said tract, to be of the width of one hundred and fifty feet, and through cultivated fields or cleared land to be of sufficient width for the roadbed, trestles and cuts only.

The construction of section 2056 of the Code, being chapter 508 of the Acts of 1798, providing for the opening of cartways, has been frequently before this court; its constitutionality has never been questioned and is not involved in this appeal. The validity of similar statutes has been discussed and sustained in other jurisdictions upon the ground that although established and opened upon the petition of private land owners, and primarily for their benefit, they are, as provided [288] by our statute, open for the free passage of all persons on horse, foot, in wagons or carts. This extension of their use impresses upon them a public character. In this way the power to invoke the right of eminent domain for the purpose of opening and maintaining them is sustained. It is said: "Roads and streets used by the public with a right in all the public to use them are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is, not simply how many persons do actually use them, but how many have a full and unrestricted right in common to use them; for if the public generally are excluded, the way must be regarded as a private one. If the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used. When the way is a private one, the right of eminent domain cannot be successfully invoked. The right itself exists only for the public, and no private interest, however weighty, can call it into exercise. The question, therefore, must always be, not what private interests will be promoted, but what is the public requirement. The name given the way does not determine its character, for if a road be called a private road or a neighborhood road, but is, in fact, so laid out and maintained as to give the public a right to freely use it, upon terms common to all, the road, notwithstanding its name, is a public one": Elliott on Roads, 2d ed., sec. 192. The converse of the proposition is stated in section 193, that if the road is so laid out as to give only a limited class of persons the sole right to use it, it is for that

reason a private road, without regard to the name by which it is known or called. "If a class, to the exclusion of the citizens generally, acquire a right to use the road, it is no more than a private way": Elliott on Roads, 2d ed., sec. 192. Discussing the same question, it is said: "Where the road laid out on the application and paid for and kept in repair by a particular individual, who is especially accommodated thereby, is, in fact, a public [289] road, and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which the land may be condemned. But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private and the law authorizing the condemnation of property is void": Lewis on Eminent Domain, 167. Speaking of private cartways over which the public are allowed to pass, the author says: "The roads here provided for are quasi public, and have been sustained as a valid exercise of the power of eminent domain. It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified": Lewis on Eminent Domain, 167. A statute similar to section 2057, as amended by chapter 46 of the Laws of 1887, was enacted by the legislature of Pennsylvania for the benefit of owners of land upon which there were deposits of anthracite coal. In Waddell's Appeal, 84 Pa. St. 90, the validity of the act was discussed and denied because the way authorized to be opened was not for the use of the public. The supreme court of Indiana, in Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399, said: "Concede that the public exigency requires that a way should be opened to every man's farm, and that the state may and should provide for the establishment of a public road or highway to enable every citizen to discharge his duties and travel to and from his farm; it does not follow that such ways should be private and owned by the party applying for them. If it would be of public utility to establish the road, then it should be a highway. If not, then the right of eminent domain cannot be exercised to establish it. It is not the amount of travel, the extent of the use of a highway by the public, that distinguishes it from a private way or road. It is the right to so use or travel upon it—not its exercise." In a well-considered opinion delivered by Dillon, [290] C. J.

(Bankhead v. Brown, 25 Iowa, 540), it is said: "Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially private? For it must be private if it is of such a nature that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it."

The defendants' counsel, in an able and interesting argument before us, conceding the general principle governing the right to take private property or impose burdens thereon, insist that by reason of the peculiar conditions developed by the affidavits in the record, the use for which the plaintiff's land is sought to be subjected to the easement, is public in its character. They call to our attention the large and valuable timber standing upon the mountains of Western North Carolina, the removal and marketing of which brings wealth into the state, opens the land to cultivation and homes for the people now there and who are coming into that section of the state. They say that while the logs may be hauled over the mountain roads, but at very large expense, the portions of the trees, limbs, tops, etc., unfit for lumber, which are now wasted, may be made useful and valuable for many purposes, and that it is their purpose to establish tanneries and factories for utilizing these products, etc. That by these means the revenues of the state will be increased, the development of the natural resources encouraged, immigration brought into that section, and many other benefits accrue to the public. These views, with the facts upon which they were based, were presented with much force by counsel. They have received, as they were entitled to, most careful consideration. They have been made in other cases in other courts. They invite courts to find in the term "public use" a broader and larger meaning. Their persuading and almost compelling [291] force may be seen in the legislation of the states and the decisions of the courts. While they have, in some cases, stimulated material growth and development, it is manifest that valuable private property rights and stores of natural wealth and resources for feeding, clothing and making comfortable the rapidly increasing population have been sacrificed to them. That great and dangerous monopolies have been fostered by the liberal construction put upon the term "public use."

It has sometimes happened that a stubborn and possibly sentimental owner of land has stood in the way of the development of the country and of the impatient, strenuous promoter and industrial pioneer. It may be that his rights have not received either in the legislature or the courts the consideration to which they were entitled. It is conceded that courts and authors have found much difficulty in defining the term. It does not concern us to attempt to do so to any other or further extent than is necessary to a decision of this appeal. Mr. Lewis, after an interesting discussion of the subject, says: "Perhaps no better example of a public use can be given than that of the ordinary highway, when the easement or right of way vests in the public for the common and equal use of all": Sec. 166. The terms upon which the public may use the highway are of course subject to legislative regulation, as on railroads or steamboats, by paying the prescribed fare, going upon and leaving at regular stations, and conforming to those reasonable regulations made by the corporation or other agency for the protection of the public; and on the ordinary country highways, by conforming to those statutes or immemorial customs which have become the "law of the road," etc. In Pittsburg etc. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680, the term "public use," as applied to the right of a railroad company to condemn private property for the purpose of constructing a lateral road to reach a particular customer, is discussed and the authorities reviewed, Johnson, P., concluding his opinion: [292] "As far as the public is concerned, when what they need is for 'public use,' they have a right to invoke the exercise of eminent domain; but in so far as that which concerns them as to their private interests, their profits and gains is concerned, they stand as individuals or as merely private corporations in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain."

In reply to the argument of counsel that by such holding a deadly blow was aimed at the industries of the state, the learned judge said: "It seems to us if railroad corporations were permitted ad libitum to do what this defendant in error asks to be done, no deadlier blow could be dealt at the private rights of the citizen. The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only permission, and not to whom the

tax or toll for supporting them is paid": 2 L. R. A. 682, note; 15 Cyc. 583; Board of Health v. Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

The question presented by this appeal and the argument to sustain the right was discussed in Healy Lumber Co. v. Morris, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681, 63 L R. A. 820. A statute similar to ours, as amended, was enacted, enabling owners of timbered lands to condemn a right of way for tramroads and railroads for the purpose of transporting timber to market. The exact question before us was presented, Dunbar, J., saying: "This case presents the important question, deserving the most serious consideration, involving as it does the respective interests of private rights and of property of the state sought to be protected and fostered through the exercise of the high prerogative of sovereignty; the former being guaranteed by the fundamental law, and the latter being the subject of universal interest and concern. Eminent domain is the right or power of a sovereign state to appropriate private property. The learned attorney for appellant has favored [293] the court with an exhaustive and earnest argument in his brief, and a painstaking showing is made of the magnitude of the lumbering business and interests of this state, and the effect that it presumably has upon the general prosperity of the commonwealth; and we are urged to announce a broad and statesman-like principle in determining this question, and one which would further business prosperity of the state, rather than one which would hamper and retard it. But the court cannot invade the province of the law-making power of government and intrude into its decrees its opinions on questions of public policy. Its duty is to strictly recognize its legal limitations, and confine itself to the narrower duties of interpretation and construction." To the argument that a liberal construction should be given to the term "public use," because in the section of the state in which the proposed road is to be built the removal of the standing timber is promotive of the improvement of that section, the answer is that: "The constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform and to constitute a check on the more mutable sentiment and actions of members of different legislatures. And it seems to us that the result of such construction would be a virtual removal of any constitutional inhibition on legislative

power in this respect." There is a distinction between public policy or public welfare and public use. "It might be of unquestionable public policy and for the best interest of the state to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade and increase property values and thereby increase the revenues of the state, even if the enterprises were purely private, for such is the relation, under our form of government, between public and private prosperity, that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this [294] was not the kind of public use that was within the minds of the framers of the constitution, and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on the grounds of public policy." The question is exhaustively discussed in Bloodgood v. Mohawk etc. R. R. Co., 18 Wend. 9, 31 Am. Dec. 313, in which it is said: "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term, public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded and we permit ourselves to be governed by speculations upon the benefits which may result to localities from the use which a man or set of men propose to make of the property of another, we are afloat without any certain principle to guide." Judge Cooley says: "It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such case would be the property of him for whom it was established": Cooley's Constitutional Limitations, 652. To the suggestion that only an easement for the period of five years is imposed upon plaintiff's land, and that such period is a reasonable time to remove the timber, we quote the same eminent authority: "And although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what quantum of interest would pass from him; it would be sufficient that some interest, the appropriation of which

detracted from his right and authority and interfered with his exclusive possession as owner, had been taken against his will; and if taken for a purely private purpose, it would be unlawful." Again he says: "The [295] public use implies a possession, occupation of the land by the public at large or by public agencies."

Without pursuing the subject further, we entertain no doubt that the amendment made to sections 2056, 2057 of the Code by chapter 46 of the Laws of 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional and invalid. This conclusion does not affect the right of condemnation of a cartway as provided by the statute over which all persons may pass, etc. We see no objection to the extension of this privilege to owners of timber lands under the same limitations and conditions as persons settled upon or cultivating lands. It is manifest that the defendants are not seeking this restricted right. They say that it is their purpose to construct the railway for their exclusive use. This concession deprives them of the benefits of the statute, eliminating the amendment of 1887. Counsel call to our attention the decisions of this court sustaining the drainage acts. Without discussing these acts, it is sufficient to say that they expressly confer upon all persons having lands adjoining or capable of drainage through the drains or canals authorized to be opened the right to avail themselves of these benefits. This distinguishes those statutes from the one under discussion. It is also contended that it is peculiarly the province of the legislature to say what is a public use, and that its decision may not be reviewed by the courts. While it must be conceded that expressions are to be found in decided cases, several of which are cited by counsel, and in some text-books which seem to sustain this contention, it will be found that they are subject to the limitation that the question is primarily one for the legislature, but its decision is not conclusive, otherwise the legislature could nullify the principle protecting private property. The correct view is stated by Judge Cooley: "The question, what is a public use, is always [296] one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for the appropriation of property, but it will not be conclusive": Cooley's Constitutional Limitations, 660; Pittsburg etc. R. Co. v.

Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680. "The question whether a particular use is public or not is ultimately a question for the courts. This is necessarily true in view of the constitutional provisions of the different states that private property can be taken only for a public use, since the interpretation of constitutional provisions is within the province of the judiciary": 10 Am. & Eng. Ency. of Law, 2d ed., 1066; Call v. Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468, in which Shepherd, C. J., says: "Whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary": Citing Lewis on Eminent Domain, 185; Mills on Eminent Domain, 10, 11. The distinction is this—whether a use is public is for the ultimate decision of the courts. If the use is public, the expediency or necessity for establishing it is exclusively for the legislature. In the discussion of the questions presented, we have assumed that the provisions limiting the power of the legislature to take private property were constitutional. As is well known to the profession, no such provision is found in our state constitution, but since the opinion of Ruffin, C. J., in Raleigh etc. R. R. v. Davis, 19 N. C. 451, the principle has been treated as fundamental and as existing with the same universal application as if imbedded in the constitution. Rodman, J., in Johnston v. Rankin, 70 N. C. 555, says: "The principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina": Railroad Co. v. Owners of Platt Land, 133 N. C. 266, 45 S. E. 589. While, as found by his honor, it is reasonable, and even necessary to the successful operation of defendant's enterprise that they carry their timber and timber products over plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken [297] a fundamental principle upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened.

The judgment of his honor continuing the injunction must be affirmed.

The Condemnation of Land under the power of eminent domain for railroads and tramways in aid of lumbering and mining is discussed in the monographic note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 829, 830, and in the subsequent case of Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 107 Am. St. Rep. 711. Whether the end sought to be attained by taking private property is a public use is a question to be determined by the courts: Albright v. Sussex County etc. Commission, 71 N. J. L. 303, 108 Am. St. Rep. 749; Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526. See the discussion of this question in the monographic note to Chicago etc. Ry. Co. v. Morehouse, 88 Am. St. Rep. 926-946.

PERRY v. FARMERS' MUTUAL FIRE INSURANCE ASSOCIATION.

[139 N. C. 374, 51 S. E. 1025.]

INSURANCE.—When Members of a Mutual Fire Insurance Association have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion thereof. (p. 795.)

INSURANCE.—A Member of a Mutual Fire Insurance company, whose losses are payable from assessments upon the other members, cannot hold the officers of the company personally liable for his loss, because they have diverted funds upon which he had no claim for his loss. His remedy is to have an assessment made to pay his loss. (p. 796.)

INSURANCE.—A Member of a Mutual Fire Insurance company cannot hold the officers thereof personally liable for the amount of his loss, on the ground that they procured the dissolution and reorganization into a new company of the branch association which was liable for the loss. (p. 796.)

Adams, Jerome & Armfield, for the plaintiff.

Redwine & Stack, for the defendant.

375 CONNOR, J. Plaintiff recovered judgment in the superior court of Union county against the Farmers' Mutual Fire Insurance Association upon a policy issued by said corporation, "by and through the Union and Stanly branch." The judgment was affirmed by this court at the February term, 1903 (132 N. C. 283). It appearing from the record in that cause that the Union and Stanly branch had ceased to exist, and that its liabilities had been assumed by the Union branch, judgment was directed to be entered that the amount be paid by assessments upon the members of that branch, which was done at the next succeeding term of the court. The judgment not having been paid, plaintiff instituted the

present action against the corporation, the Farmers' Mutual Fire Insurance Association, and W. H. Phifer and James McNeely. In the complaint it is alleged, in addition to the foregoing facts, that the defendant Phifer is president and McNeely is secretary and treasurer of said Union county branch. That by the provisions of the charter of the defendant, the terms of the policy, and the judgment thereon, it was the duty of the president of the Union county branch of said corporation to levy an assessment upon all the members of said branch, sufficient to pay the said judgment. That demand was made therefor and refused. That since [376] the rendition of said judgment the said branch, through its officers, has paid on account of claims against it an amount more than sufficient to pay the same. That more than one hundred dollars have been paid to the defendants, the president and the secretary and treasurer, on account of salaries and commissions, and two hundred and twenty-three dollars paid to B. D. Austin on a claim which had no preference over the plaintiff.

That since the rendition of said judgment the defendants, the president and secretary, with the intent and for the purpose of preventing the plaintiff from collecting his judgment, called a meeting of the members of said corporation living in Union county and composing said Union county branch and attempted to dissolve said branch and to form another association, of which the defendant, W. H. Phifer, is president, and James McNeely is secretary and treasurer. That the holders of the policies in the Union county branch were permitted to surrender their policies therein and take out other policies in the new corporation, without the payment of any fee, while new members were required to pay an entrance fee of fifty cents. The plaintiff asks that a mandamus issue commanding the defendant, W. H. Phifer, to levy an assessment sufficient to pay his judgment, and for a personal judgment against the defendant Phifer and McNeely. The defendant corporation filed no answer. The defendants Phifer and McNeely joined in an answer, in which they say that there is a misjoinder of causes of action. They deny that there was ever organized any such branch of the defendant corporation as the Union county branch. That if there was ever such a branch, it was not sued by the plaintiff, nor was any judgment ever recovered by plaintiff against such branch. Nor was the defendant corporation ever sued on account of

any liability of such branch. They deny that any demand was made on the Union county branch to levy an assessment to pay plaintiff's judgment, for the reason that there was never any such branch upon which to make a demand. They [377] admit the payment of the amounts as alleged, but deny that plaintiff had any claim or lien thereon. They aver that in some litigation pending in the superior court of Union county it was adjudged that the Union and Stanly county branch had ceased to exist, and no such branch as the Union county branch had been organized. That thereupon a new corporation was chartered and organized under the corporate name of "The Farmer's Mutual Fire Insurance Company of Union County." That said corporation had no connection with the defendant corporation or any of its branches, and is not successor thereto. They deny that they have ever attempted to defeat the payment of plaintiff's judgment. At the close of the evidence plaintiff withdrew his demand for a mandamus against the Farmers' Mutual Fire Insurance Association of North Carolina; defendants Phifer and McNeely moved for a judgment of nonsuit, which was allowed; plaintiff excepted and appealed.

Several interesting questions in regard to the right of the plaintiff to enforce the payment of his judgment by mandamus directed to the defendant corporation are eliminated by his course in withdrawing any demand therefor. When the appeal in the original action was before us, it appeared that the Union and Stanly county branch, through which the policy was issued, had separated, and that the Union county branch had assumed the liabilities of the original branch. We are not sure that we understand what is meant by the allegation in the answer that there was never any Union county branch of the defendant corporation. We would be unwilling to think that the officers of the defendant corporation would issue to its members a policy of insurance for which no one, either individually [378] or corporately, was liable. If so improbable a thing was done, the persons issuing the policy and receiving plaintiff's money upon assessments would be liable for damages in another form of action. The record shows that while plaintiff's policy was in force, and after the division of the branch, assessments were levied upon and paid by the plaintiff to meet losses sustained "since the division of the Union and Stanly county branch." The record contains several notices to plaintiff, issuing from the

"Office of W. H. Phifer, President Union County Branch of the Farmers' Mutual Fire Insurance Association of North Carolina," signed by "James McNeely, Secretary and Treasurer," and marked "paid" by him. We presume that notwithstanding this testimony, which causes us, as it is well calculated to cause others, to suppose that some one was responsible upon contracts made and for money paid pursuant to those notices, there is some legal reason why the Union county branch was at all times a myth, with capacity to take in, but none to pay out money. After a second careful examination of the charter of this corporation, we are not sufficiently astute to perceive why some one, either corporate or natural, is not responsible to the plaintiff upon his contract, or for damages for inducing him to enter into it. The loss was adjusted by the duly appointed officers. His money was received both before and after the fire, and a jury have found every controverted fact in his favor. While it must be conceded that the organization of the defendant corporation is somewhat peculiar, we have discovered nothing in the record to cause us to change our opinion that the "Union branch is liable to the plaintiff, and if the defendant fails or refuses to make the assessment, the plaintiff would be entitled to a mandamus compelling it to do so. The Union branch is not a corporation, and is not a party to this action. The remedy must be worked out through the defendant corporation": Perry v. Farmers' Mut. Life Ins. Assn., 132 N. C. 283, 43 S. E. 837. The contract of insurance was with the defendant [379] corporation "through the Union and Stanly county branch." The by-laws, put in evidence, provide that "it shall be the duty of the president of any branch of this association to sign all policies issued through said branch, and order all assessments after they have been properly adjusted." It cannot be that the law will permit persons to hold themselves out as officers of a corporation, make contracts, assume liabilities, receive money, etc., and avoid all responsibility by simply denying the existence of the corporation or the agency through which it professes to act. It is evident that the defendant corporation was organized for the purpose of affording persons residing in the county an opportunity to insure their property at a low rate fixed by actual losses and small amount for expenses. It was not contemplated that the corporation should have any capital stock or surplus fund. The security of the member was to depend

upon the prompt assessment upon, and payment by each member, of the amount necessary to pay the loss. The business was to be conducted by branches formed in the several counties, each branch being, in respect to its policies and losses, independent. This is all simple and plain, but the success of the plan is necessarily very largely dependent upon the good faith of the members and managers. It is well known that the parties are not experienced in the business of insurance or the management of corporations. The courts have sought to sustain and enforce such contracts by looking to the substance and intention, rather than by adopting a technical or strained construction: Bacon on Benefit Societies, sec. 178. While it is not perfectly clear how the remedy for failure to levy and collect the assessment is to be worked out, we have no doubt that an order may be formulated which will enforce the discharge of duty imposed by the charter. Neither officers nor members of corporations can evade their plain duty to those with whom contracts are made, by dissolving the organization and leaving creditors [380] unprovided for. To permit this to be done would invite and encourage dishonesty and fraud. If the corporation has property, it is impressed with a trust for the benefit of creditors. If there are unpaid subscriptions to the stock, the courts enforce their collection and appropriation upon the same principle: Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680. We do not doubt that in mutual insurance companies amounts due upon assessments already made, or to be made, to pay losses accrued, the same principle is applicable. It cannot be that where all the members have enjoyed the protection which membership affords, they can, after a loss has been sustained, withdraw and refuse to pay their portion of the loss: 21 Am. & Eng. Ency. of Law, 2d ed., 277. It is well settled that when several persons participate in the irregular organization of a corporation, they cannot avoid responsibility to its creditors by showing the invalidity of the organization: Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680. The plaintiff, however, waives, in this action, his remedy by mandamus and seeks to hold the defendants Phifer and McNeely liable personally. This claim is based upon two grounds: 1. That they paid to themselves, as commissions and salary, one hundred and twenty-six dollars, and to B. D. Austin two hundred and twenty-three dollars. The plaintiff is con-

fronted with the objection that he has no claim upon this fund. It does not clearly appear how or from what source it originated. The right of each policy-holder is to have an assessment made to pay his loss. It is from this source alone that he is to be paid. This is apparent from an examination of the by-laws and the notices sent to each member set out in the record. It therefore follows that the plaintiff had no claim upon or right to the amount paid Austin. If it was improvidently paid, the officers are liable to the corporation. 2. The plaintiff's next claim is that the defendants are liable personally for that they procured the dissolution of the Union branch and the formation of a new company. As we have seen, the defendants Phifer and McNeely had no power to so dissolve the Union branch [381] or withdraw its members from the corporation as to affect their liability to the plaintiff. They had a right, if they saw fit, to charter and organize a new corporation, and to prescribe the terms upon which members should be admitted or policies issued. This left the legal status of the plaintiff unimpaired. We cannot perceive how any cause of action accrued to the plaintiff by the formation of the new company. It does not appear that the new company took over any assets of the Union county branch, and it expressly refused to assume any liability for plaintiff's judgment. So far as the record shows, the members of the Union branch of the defendant company have never refused to pay plaintiff's judgment. They have never been called upon to do so by an assessment. We are of the opinion that the judgment of nonsuit was properly ordered. While we can see much practical difficulty in enforcing the payment of an assessment when made, we can see no reason why, by motion in the original cause, the plaintiff may not have an order directed to the defendant corporation to have the assessment made pursuant to its charter and by-laws. If the officers should refuse to discharge their duty, we do not doubt that power resides in the court to enforce its performance, or to appoint a receiver with directions to make and collect the assessment. If this is not so, the maxim that there is no wrong without a remedy is not true.

The judgment must be affirmed.

A Policy-holder in a Mutual Insurance association stands in a twofold relation toward the company. He is insurer and insured: Condon v. Mutual Reserve Assn., 89 Md. 99, 73 Am. St. Rep. 169.

BIDWELL v. BIDWELL.

[139 N. C. 402, 52 S. E. 55.]

DIVORCE—Conclusiveness of Foreign Decree.—A decree of a court in one state, in respect to which no fraud or want of jurisdiction is alleged, that a divorce granted in another state is valid, is binding in a third state, and precludes an attack there on the validity of the decree of divorce. (p. 803.)

DIVORCE—Foreign Decree—Estoppel as to Alimony.—A defendant in a divorce action who accepts a money allowance awarded her, and who some six years later herself institutes an action for a divorce in another state, which is determined against her, and in which she is awarded another allowance, is estopped, after considerable further delay in apparent acquiescence, her husband having meanwhile contracted a second marriage, to assert a claim, in the courts of a third state, for further pecuniary allowance from him. (pp. 804, 805.)

Argo & Shaffer and Douglass & Simms, for the plaintiff.

Busbee & Busbee, Shepherd & Shepherd and Jones & Johnston, for the defendant.

403 HOKE, J. This was a civil action under section 1292 of the Code to recover for support and maintenance of plaintiff and her minor child. Plaintiff alleged that plaintiff and defendant were man and wife; that defendant had unlawfully abandoned plaintiff, and failed to provide reasonable subsistence for plaintiff and her minor child, though fully able to do so.

Defendant answered, denying that he had wrongfully deserted plaintiff; charged the separation to plaintiff's own conduct, and further set up the record, proceedings and decrees of two courts—one in North Dakota, in which the present defendant was awarded an absolute divorce, and the second, a record and decree of Massachusetts in which the present plaintiff sued the present defendant for absolute divorce, and in which there was a decree that the divorce granted in the North Dakota court was valid and binding, and that plaintiff and defendant did not hold the relationship of man and wife, and set up these two records and decrees as an estoppel in bar of relief.

Plaintiff replied to the answer, and averred that the decree of divorce granted by the court in North Dakota was null and void, and should be so held, because at the time of the institution of said suit, and proceedings and decree therein, neither plaintiff nor defendant had any bona fide domicile in North

Dakota, "but that defendant had gone to said state with no intent or purpose of becoming a resident, or acquiring a bona fide domicile therein, but with the sole purpose of obtaining by fraud and secretly a divorce from plaintiff." Further replying, plaintiff averred that the plaintiff was forced by stress of want and dire necessity, being penniless, friendless, homeless and in a strange land, either to accept such terms as the present defendant might dictate, or go hence in destitution for herself and infant child, and under and by virtue of [404] this hard duress from a necessity from which there was no escape, she took the money he agreed to give her.

There was evidence to the effect that the present plaintiff had appeared and answered in the suit in North Dakota; that the decree of divorce was entered after investigation had; and the plaintiff in this suit had been awarded and paid ten thousand dollars as a full and reasonable allowance for the care, education and maintenance of her minor child.

It further appeared that at the time of the institution of the suit in Massachusetts by the present plaintiff, and pending the proceedings therein, the said plaintiff was a citizen, resident and domiciled in Massachusetts, and the defendant had appeared and answered to the libel filed in the cause.

The record of findings of fact and conclusions of law, in which the decree of absolute divorce was awarded in the North Dakota suit, are as follows:

1. That the plaintiff now is, and at all times since more than ninety days preceding the commencement of this action has been, in good faith a resident of North Dakota, and that defendant is a resident of Springfield, Massachusetts, but is now in this state.

2. That plaintiff is now about twenty-six years of age, and defendant is now about twenty-nine years of age.

3. That on December 9, 1890, plaintiff and defendant were married, and that said marriage has never been annulled or dissolved.

4. That there are two children, living issue of said marriage between plaintiff and defendant herein, to wit: Mary Beulah, a girl four years of age, and Maud, a girl two years of age—the former of which is in the custody of the plaintiff, and the latter in the care and custody of the defendant.

5. The plaintiff and defendant lived together after their said marriage as husband and wife until about the month of

December, 1893, at which last-mentioned time they separated and have lived separate and apart ever since.

[405] 6. That this is an action for divorce, and that this court has full jurisdiction of both the parties thereto, and of the subject matter of the action.

7. That defendant, as appears from the proofs herein, has been, and is, guilty of willful desertion of the plaintiff, and that such desertion, as shown by the proofs herein, is cause for full and absolute divorce under the laws of this state.

8. That the true and best interests of the parties, and of the minor children of the parties, all require that the custody of said minor child, Mary Beulah, be awarded to and confirmed in the plaintiff; and the custody of said minor child, Maud, be awarded to and confirmed in the defendant.

9. That, from the proofs as they appear herein, the sum of ten thousand dollars is a fair, reasonable and just sum to be paid by the plaintiff to the defendant for the support, care, custody, maintenance and education of said minor child, Maud, and that the decree herein should require plaintiff to pay said sum to defendant in that behalf. But, and the decree shall so provide, the payment of said ten thousand dollars shall be in full discharge of all obligations of the plaintiff to the defendant, including not only in behalf of said minor child, Maud, but also in full discharge of all obligations from him to her, of or on account of alimony, support, money, rights of dower, if any, and any and all other obligations whatever, except there be reserved to the said defendant her right of dower, if any she have, in a certain farm in the state of North Carolina, called and known as the "Moore farm," near Franklin, in the county of Macon, in said state, formerly owned by plaintiff.

10. That justice to the parties requires, and that the decree shall so provide, that each of the parties may visit the child in the care and custody of the other, at reasonable times and places; provided in that behalf, however, that when defendant desires to visit the said minor child, Mary Beulah, she shall not be required to do so at the home of the plaintiff's [406] parents or relatives, but may do so at the house of some disinterested friend, and with such child in the then temporary custody of such disinterested friend or of the plaintiff.

Let judgment be entered herein in conformity with the foregoing, by the clerk of the district court, etc. (Signed by W. S. Lauder, judge, etc., September 20, 1895.)

And the proceeding and decree in the libel for divorce entered in Massachusetts are as follows:

Respectfully libels and represents Ella J. Bidwell, of Springfield, Massachusetts, that she was lawfully married to George H. Bidwell, now of Culasaja, in North Carolina, at Walhalla, in South Carolina, on the ninth day of December, 1890, and thereafterward your libelant and the said George H. Bidwell, lived together as husband and wife in this commonwealth, to wit, at Chester, in said county, and that your libelant has lived in this commonwealth for five years last preceding the filing of this libel; that your libelant has always been faithful to her marriage vows and obligations, but the said George H. Bidwell, being wholly regardless of the same, at Culasaja, in North Carolina, on Friday, the first day of December, 1893, or thereabouts, without just cause, willfully and utterly deserted your libelant, which desertion has continued for three consecutive years, next prior to the filing of this libel. Wherefore your libelant prays that a divorce from the bonds of matrimony may be decreed between your libelant and the said George H. Bidwell, and that the care and custody of Maud Bidwell and Beulah Bidwell, both minor children of said libelant and libelee, be decreed to said libelant, and such other relief as to your honors shall seem meet and as justice may require. (Signed Ella J. Bidwell, February 4, 1902.)

The foregoing libel was entered in the court on the tenth day of February, 1902, when the libelant appeared by her attorneys, Bates & Armington, and the libelee appeared by his attorney, E. H. Lathrop; and on the back of said libel is the following acceptance of service: "I accept service of this [407] precept, and appear for the libelee, reserving all rights." (Signed E. H. Lathrop, attorney for libelee, February 10, 1902.)

And on March 19, 1902, the libelee filed his answer as follows: "The libelee denies each and every allegation in the libel except said marriage, and that he neither denies nor admits, but leaves the libelant to prove. If the libelant shall prove said alleged marriage, the libelee alleges that he was divorced from the libelant by the district court of Cass county, state of North Dakota, a court of competent jurisdiction, and having jurisdiction of the cause and both parties thereto, prior to the beginning of this libel, to wit, September 21, 1895, and which decree of divorce is in full force and ef-

fect, and was at the time of bringing this libel. The libelee further says that the libelant has brought two libels against him prior to this one, in which said divorce has been pleaded, all of said proceedings being in this county, and of record here; that last proceeding was filed in this county April 12, 1897, and was dismissed January 6, 1902; that said libelee therein pleaded said divorce granted to him as aforesaid in North Dakota, and your libelee says that the issue in this case has been adjudicated in this court, and the libelant is barred from proceeding in this action thereby, and from being granted divorce as prayed for." (Signed by E. H. Lathrop, attorney for libelee.)

On March 25th there was a full hearing of the evidence, and on March 26th the following decree was filed in the case in the Massachusetts court: "This case came on to be heard on Tuesday, March 25, 1902, before Mr. Justice Maynard, both parties appearing by their respective counsel (naming them); now it appeared upon the hearing of said cause that prior to the bringing of this libel, to wit, September 20, 1895, the said libelee in the above-entitled action, the said George H. Bidwell, was divorced from the said libelant, the said Ella J. Bidwell, by the district court, for the third judicial district [408] of North Dakota, for a cause of divorce recognized in said North Dakota and in this commonwealth, said district court having had jurisdiction of both cause and parties, both parties appearing therein personally, and by counsel, and the libelee having filed an answer to said libel; and it further appeared that neither before nor since the filing of this libel was the said George H. Bidwell an inhabitant of this commonwealth. It is hereby decreed and determined that this libel is hereby dismissed, and that said decree of divorce granted by said district court of North Dakota, and pleaded herein, is a good and valid divorce in this commonwealth, and that the parties are concluded thereby. We hereby assent to this decree." (Signed by counsel of both parties, and certified by the clerk of the court.)

The jury having been impaneled and the above records presented, further proceedings were had as follows: "This cause coming on to be heard after the introduction of the exemplified copies of the records and decrees in the case of George H. Bidwell against Ella Bidwell, rendered in the court of North Dakota, as alleged in the answer, and the records and decrees in the case of Ella J. Bidwell against

George H. Bidwell, rendered in the superior court of Hampden county, Massachusetts, the plaintiff offered testimony tending to prove that the defendant went to North Dakota, not intending to become a resident of that state, and testimony tending to prove the other matters alleged in the replication. Thereupon the court intimated to the counsel for plaintiff that he would charge the jury that the plaintiff was estopped by the Massachusetts decree, notwithstanding the matters alleged in the replication touching the validity of the North Dakota decree, and in deference to that intimation the plaintiff submitted to a judgment of nonsuit, and appealed."

409 On the facts presented for our consideration, the right of the plaintiff to the relief demanded depends on whether the plaintiff and defendant are now husband and wife: Skittletharpe v. Skittletharpe, 130 N. C. 72, 40 S. E. 851. It will be noted that the plaintiff in her reply assails the validity of the North Dakota decree, first for lack of jurisdiction, and, second, for that the same was obtained by fraud and duress. But no such impeaching allegations are made against the proceedings and decree of the court of Massachusetts. This being true, we are of opinion that the latter decree conclusively determines that the plaintiff and defendant are no longer husband and wife, and that the plaintiff has, therefore, no right to further support from the defendant.

It is accepted doctrine that so far as the subject matter of the controversy is concerned, actions for divorce deal with the status of the parties, and that jurisdiction in such actions is dependent upon the domicile of the parties at the time the decrees are rendered. Where neither party has a domicile in the state of the forum, such court having no jurisdiction of the subject matter of the controversy, a decree of divorce is void, though both parties may have appeared and voluntarily submitted themselves to the jurisdiction of the court.

Where the plaintiff only is domiciled in the state of the forum, and has obtained a decree of divorce for a cause recognized as valid in such state, after constructive service of process on the defendant, according to the course and practice of the court, there has heretofore been diversity of opinion as to the extent and binding force of such a decree in other jurisdictions. North Carolina has heretofore held against the validity of such a decree by the courts of other

states, as affecting the status of her own citizens. The better doctrine, however, now seems to be that where the domicile of the plaintiff has been acquired in good faith, and not in fraud or violation of some law of a former domicile, a divorce [410] of this kind should be recognized as binding everywhere—certainly within the jurisdiction of the United States or any one of them: Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. Rep. 237, 47 L. ed. 366.

The case of Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794, does not establish the proposition here stated, on precisely similar facts to the case before us, or it would be controlling; but the general tenor of the decision would seem to favor this conclusion.

Where, however, the action is instituted and the decree obtained in the state of the plaintiff's domicile, and the defendant has been served with process within the jurisdiction of the forum, or has voluntarily appeared and answered, all the decisions are agreed that a decree in such case is valid, both in rem and in personam, and will bind and conclude the parties everywhere: Jones v. Jones, 108 N. Y. 415, 2 Am. St. Rep. 447, 15 N. E. 707; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200. The proceedings and decree of the court of Massachusetts are of the latter character.

It is admitted or established that the plaintiff in that suit, as she is in this, was at the time, and still is, resident and domiciled in the state of Massachusetts. Her libel was for the purpose of obtaining an absolute divorce from the defendant. He appeared and answered, and set up the proceedings and decree of the North Dakota court in bar of the plaintiff's demand. The Massachusetts court, after full hearing, dismissed the libel on the ground that the North Dakota decree was valid, and that the status of the parties was not that of husband and wife.

There is no allegation or claim that the court which rendered this decree is without jurisdiction, or that the same was obtained by fraud. The investigation and decree necessarily passed upon and determined the very questions involved here. The court had jurisdiction both of the cause and the parties, and the conclusion is not open to further investigation.

[411] True, the case on appeal states that the plaintiff was ready to produce testimony that the defendant never had any

domicile in North Dakota, and that such court was without jurisdiction, and that the decree of the Dakota court was obtained by fraud and duress. The answer is that the validity of the divorce has been established by a decree of a competent court, having full jurisdiction in the cause, where the very questions she now seeks to raise had been, or could have been, passed upon and determined, and that the plaintiff is thereby estopped from further question concerning them: Jenkinss v. Johnston, 57 N. C. 149; Tuttle v. Harrill, 85 N. C. 456; McElwee v. Blackwell, 101 N. C. 192, 7 S. E. 893; Thurston v. Thurston, 99 Mass. 39; Hood v. Hood, 110 Mass. 463; Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482; Cromwell v. County Sac, 94 U. S. 51, 24 L. ed. 681.

It is suggested that the decree of the Massachusetts court is a consent decree, and for that reason is not binding or conclusive between the parties in actions of this character. The question, however, does not arise on this record, for we are clearly of the opinion that this is not a decree by consent. The entire record discloses that the case was conducted throughout as an adversary proceeding, and judgment was entered after full and due inquiry into the facts. Our decision of the cause is in accord with the general equities of the case, as indicated by the course of events and the conduct and present status of the parties.

The plaintiff, having appeared and answered in the suit in North Dakota, receives ten thousand dollars, awarded her in that case for the care and custody of his minor child. After a delay of six and a half years she institutes her own suit for divorce in Massachusetts, which is determined against her, and in which she is awarded ——— thousand dollars by way of allowance. Again, after considerable delay, in apparent acquiescence, she brings this suit, seeking further allowance for support. The defendant, in the meanwhile, in reliance on [412] the decrees of two courts—one of them certainly having full jurisdiction of both cause and parties—has married another woman, and had a child born to him by this marriage.

Apart from the estoppel by record on the principal question, there is strong authority for holding that the plaintiff is estopped by conduct in pais from asserting any further claim for pecuniary allowance against the defendant: Nichols v. Nichols, 25 N. J. Eq. 60; Mohler v. Shank's Estate, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981, 34 L. R. A.

161; Bailey v. Bailey, 44 Pa. St. 274, 84 Am. Dec. 439. There should be an end to this litigation. The defendant may well invoke for his protection the maxim, "Nemo debet bis vexari pro una at eadem causa."

We hold that there was no error in the ruling of the court below.

The Effect of Decrees of Divorce rendered in another state or country is discussed in the monographic notes to Felt v. Felt, 83 Am. St. Rep. 616; Tremblay v. Aetna Life Ins. Co., 94 Am. St. Rep. 553; Montgomery v. Consolidated etc. Co., 103 Am. St. Rep. 328. The general rule is, that a decree of divorce entered in one state, if the court has jurisdiction, has the same effect in every other state as in the state where rendered, and is conclusive of the merits of the controversy: Forrest v. Fey, 218 Ill. 165, 109 Am. St. Rep. 249.

WALKER v. MILLER.

[139 N. C. 448, 52 S. E. 125.]

PARTNERSHIP.—The Death of a Partner, in the absence of a stipulation in the articles to the contrary, works an immediate dissolution of the partnership, and the title to its assets vests in the surviving partners, impressed with a trust to close up the firm business, pay the debts, and turn over to his personal representative the share of the deceased partner. (p. 806.)

PARTNERSHIP—Deed Naming Firm as Grantee.—If the members of a partnership have died, but the firm name has been perpetuated and the business continued by others, a deed which names such partnership as grantee is open to explanation by parol evidence and may be given effect. (p. 812.)

EJECTMENT.—An Equitable Title will Sustain an action in ejectment. (p. 812.)

PARTIES.—A Court may Direct, at any Time, before or after judgment, that other persons be made parties, to the end that substantial justice be done. (p. 812.)

JUSTICE OF PEACE.—The Owner of an Equitable Title may sue in a justice's court, although a justice has no power to administer equity. (p. 812.)

John W. Graham, for the plaintiffs.

No counsel for the defendant.

[448] CONNOR, J. This is an action for the recovery of crops, instituted in justice's court, brought by appeal to the superior court, and heard by his honor, Judge Peebles, who by consent found the facts respecting the title to the land upon which the crops [449] were grown. For some time

prior to 1893 James Webb, Jr., and Joseph C. Webb were engaged in mercantile business, as copartners, under the firm name and style of James Webb, Jr., & Brother. Joseph C. Webb died in the year 1893, leaving a last will and testament, properly executed and proven to pass real and personal estate, naming James Webb, Jr., executor, who duly qualified. He bequeathed and devised his entire estate to his widow, Alice Webb.

With the full knowledge and consent of said Alice Webb, the surviving partner and executor continued to conduct the said mercantile business under the same name and style. Mrs. Webb did not become a member of the firm, but permitted and consented that the executor should use her husband's estate to carry on the business as it was done prior to his death.

James Webb, Jr., died in February, 1904, intestate, leaving as his heirs at law and distributees, Mary Webb, his widow, and Brown R. Webb and J. C. Webb, his sons. The estate of Joseph C. Webb was not settled at the time of the death of said James Webb, Jr.

A. J. Ruffin and H. W. Webb were appointed and duly qualified as administrators of James Webb, Jr., deceased. T. N. Webb and J. Cheshire Webb were appointed administrators with the will annexed of Joseph C. Webb, deceased. On the fifteenth day of February, 1904, the said administrators joined in the publication of a notice to debtors of the firm of James Webb, Jr., & Brother, to make prompt payment, concluding: "We take great pleasure in assuring the old friends and patrons of this firm that the business is to be continued indefinitely under the same style and management, and we earnestly solicit the continuance of your valued patronage, promising to give you at all times the best possible values, together with the most courteous treatment." Neither of the administrators put any money into the business, nor did they intend to form a new firm, but did intend to give notice that [450] the business would be continued under the firm name and style of James Webb, Jr., & Brother, with the funds belonging to the estates of the deceased partners, which had been invested in said business. This action was taken with the full knowledge and consent of the heirs, distributees, devisees and legatees of both of said deceased partners. On July 18, 1904, the property and assets of the firm of James Webb, Jr., & Brother were sold to H. W. and J.

C. Webb. The old firm was continued for the sole purpose of collecting the debts and settling the business. J. Cox Webb was appointed agent to collect the debts due the firm.

James Webb, Jr., & Brother held a judgment against defendant Miller, duly docketed in Orange county. D. S. Miller held a mortgage on the lands of defendant Miller, which he duly foreclosed under power of sale therein. The crops in controversy were growing on the lands at the time of the sale. J. Cox Webb became the purchaser at the sale, paying the purchase price from money collected by him on account of the debts due James Webb, Jr., & Brother, and took deed therefor to James Webb, Jr., & Brother. Soon thereafter Alice H. Webb, widow of Joseph C. Webb, and B. R. Webb, J. Cox Webb, children, and Mary B. Webb, widow of James Webb, Jr., executed a deed for said land to plaintiffs. The land brought at said sale an amount in excess of the mortgage debt. In an action brought by defendant Miller, the administrators of James Webb, Jr., and Joseph C. Webb intervened; the said Miller claimed and recovered on account of his homestead interest in said land, one hundred and twelve dollars and seventy-five cents, the balance, fifty-five dollars, being applied to the judgment held by said administrators. His honor was of the opinion, upon the foregoing facts, that as the title to the land did not pass by the deed from D. S. Miller to James Webb, Jr., & Brother, the plaintiffs acquired none by the deed of Mrs. Alice Webb and others. He rendered judgment dismissing the action. The plaintiffs excepted and appealed.

451 His honor was of the opinion that there was no such person or partnership in existence as James Webb, Jr., & Brother at the time of the sale of the land, and upon the elementary proposition that, to constitute a valid deed of conveyance, there must be a grantor, grantee and thing granted, the deed or paper writing having the form of a deed was inoperative. It is, of course, common learning that the death of a partner, in the absence of any stipulation in the articles of copartnership to the contrary, works an immediate dissolution; that the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. We speak only of the personalty in this connection. The facts found by his honor show that upon the death of Joseph C. Webb, his widow,

sole legatee, permitted the surviving partner, who was also executor of her husband, to continue the business under the name of the old or original firm. This condition, with her consent, continued for nine years. The only persons interested in the assets, other than creditors, were James Webb, Jr., and Mrs. Alice Webb. His honor finds that Mrs. Alice Webb did not become a member of said firm so as to be personally responsible for debts incurred after her husband's death. We do not see how this is material to the questions presented upon this appeal, and we do not express any opinion regarding her liability to creditors, notwithstanding her purpose or intention. Certainly she and the executor were the real, beneficial and only owners of the property and the profits accruing from the business. Upon the death of James Webb, Jr., the same arrangement was made and continued by all of the parties in interest. They were all sui juris, and we can see no reason why inter sese it was [452] not competent for them to permit their property, with the consent and cooperation of the administrators, to remain in common and be used for their joint benefit, adopting any name or style agreeable to them for more easily and conveniently carrying out their purpose. The fact that they chose to carry on the business under the name of the old firm does not change their rights. They could, if they had so preferred, selected any other name. Of course, the old firm, as originally constituted, was dissolved by death of the partners. Whether the parties so intended or not, the legal effect of what they did was to create a new and original arrangement for carrying on business, the capital of which was contributed by the beneficial owners of the property. The fact that they selected the administrators of the deceased partners to manage the business so far as the questions presented upon this record is immaterial. It may be that if debts were contracted, liabilities not contemplated would have attached. For the purpose of this appeal, the transaction consisted of an arrangement between the distributees and legatees with the approval of the administrators to use the property for a joint and common benefit. The widows and children of the deceased partners were the owners and the administrators were their agents. Viewed from this standpoint, we have parties conducting business in a manner which in a limited, if not absolute, sense constituted a partnership adopting a name, which, by reason of being well known and enjoying

the confidence of its customers, was valuable to them. It was entirely proper, and not unusual, that they should do so—there was no concealment of the personal status of the parties. They gave notice of the death of the original partners. It is not uncommon for a business which, by reason of the credit and reputation for integrity of the founders, possesses value to be conducted, after their death, under its original name. In such cases it is the business of the living owners, and contracts made by or with them under [453] the name adopted have all the force and effect as if made in the names of the individuals to whom it belongs. A man, if he chooses, may carry on business in a name other than his own, or as is said by Erle, C. J., in Maughan v. Sharpe, 112 Eng. Com. L. 443: "It is clear that individuals may carry on business under any name and style which they may choose to adopt." That a deed to a partnership in which the partners are not named is valid, is abundantly established by this and many other courts. In Murray v. Blackledge, 71 N. C. 492, the deed was made to "Murray, Ferris & Co."; to the objection that the deed was inoperative because there was no grantee, Rodman, J., said: "But a deed for land is not for that reason void, any more than a bond for the payment of money is. It is a latent ambiguity which may be explained by parol": North Carolina etc. Inst. v. Norwood, 45 N. C. 65. In Morse v. Carpenter, 19 Vt. 613, the mortgage was made to "Morse & Houghton, of Bakersfield." Parol evidence was received to show that two persons were doing business in Bakersfield under that firm name. Royce, C. J., referring to descriptions ambiguitas patens, said: "There is, however, an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable on that account of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the application of terms already contained in it." The distinction between a patent and a latent ambiguity is pointed out with his usual clearness by Pearson, C. J., in North Carolina etc. Inst. v. Norwood, 45 N. C. 65. In Wakefield v. Brown, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788, it is said: "If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title, and in all cases evidence aliunde the instrument is admissible to identify the actual grantor. The

admission of such evidence does not change the written instrument or add new terms to it, but merely fixes and applies [454] terms already contained in it." The same principle controls when the uncertainty or ambiguity is regarding the grantee. The same is held in Blanchard v. Floyd, 93 Ala. 53, 9 South. 418, Coleman, J., saying: "If the proof shows that Blanchard & Burrus, a partnership, were the purchasers of the land, they owned as tenants in common an equitable interest in the land." In Menage v. Burke, 43 Minn. 211, 19 Am. St. Rep. 235, 45 N. W. 155, a mortgage to "Farnham & Lovejoy" was held valid, Dickinson, J., saying: "While it is necessary to the legal validity of such instruments that there be a grantee having a legal existence, capable of taking, and certainly designated, or so designated that his identity can be certainly ascertained, these conditions are complied with in this case, resort being had, as may be done, to facts beyond the instrument for the purpose of applying the description or designation of the persons named to the persons so described": 1 Jones on Conveyances, 244. In Maughan v. Sharpe, 112 Eng. Com. L. 443, the deed was executed to "The City Investment and Advance Co." It was objected that as there was no such corporation, the deed was void. Erle, C. J., said: "The bill of sale under which the defendants claim purports to convey the property to The City Investment and Advance Co., and not to the defendants by name; and it was contended for the plaintiffs that the goods could not pass to Sharpe and Baker. It is clear that individuals may carry on business under any name and style which they may adopt, and I see no reason why the defendants may not do so under the name of The City Investment and Advance Co. As between these parties the company are Sharpe and Baker, and the conveyance in question is a conveyance to those individuals, I cannot therefore say that the deed was inoperative on this ground."

Williams, J., said: "In this case, I apprehend the meaning of the grant is plain; the deed purports and intends to convey the goods to those persons who use the style and firm of The City Investment and Advance Co. They may or may [455] not be a corporation, but where it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them": Sheppard's Touchstone, 236. His honor, in his judgment, cites the case of Neal v. Nelson, 117 N. C. 393, 53 Am. St.

Rep. 590, 23 S. E. 428, in which it is held that a deed to "A and his heirs," A being dead, is void. This decision is put upon the ground that "heirs" is a word of limitation and not of purchase. It is said that a deed to "A or his heirs" would be good, A being dead, if his heirs could be ascertained. It is well settled that a deed to "A and his children" is valid to vest the title in them as tenants in common. His honor was of the opinion that "after July 18, 1904, when the goods and store were sold to H. W. Webb and J. C. Webb, no one constituted the old firm of James Webb, Jr., & Brother. It then ceased to exist." He therefore concluded that the deed from D. S. Miller conveyed nothing, leaving the legal title in Miller in trust for the administrators. If it be conceded, as his honor concluded, that the old firm ceased to exist, certainly the assets belonged to some one. Joseph C. Webb was appointed agent to collect them. There were no debts to pay; the assets then belonged to the legatees and the distributees of the deceased partners. When J. Cox Webb, in executing the trust reposed in him to collect the assets, purchased the land with the money of his principals and directed title to be made in the name of the old firm, it is manifest that it was his purpose to put the title in the persons who paid the purchase money. They ratified his act, treating the land as theirs by selling to the plaintiffs. The defendant, W. J. Miller, recognized the status of the title by suing for and receiving from the purchase money his homestead interest. We can perceive no reason why, both upon reason and authority, in the light of the fact found by his honor, the latent ambiguity in the description of the parties in the deed is not removed, and the true owners ascertained to be the grantors of the plaintiffs: Lowe v. Carter, 55 N. C. 377; Ryan v. [456] Martin, 91 N. C. 464; Simmons v. Allison, 118 N. C. 763, 24 S. E. 716. It is sometimes said that only an equitable title is conveyed in such cases. The better view, we think, is that which we find sustained by the authorities cited, that the ambiguity is latent and open to explanation by which the real party is disclosed and the deed treated as if the name were inserted. If, however, the other view be adopted, the same result would follow in this case. It is well settled, under our judicial system, that a party may recover in ejectment upon an equitable title: Clark's Code, sec. 177, and cases cited (p. 102). The mortgagee, D. S. Miller, has sold under the power and received the purchase money, more than sufficient

to pay the mortgage debt. The mortgagor, W. J. Miller, has received his interest in the surplus—the administrators turned over the assets of the late firm of James Webb, Jr., & Brother to J. C. Webb to collect for the benefit of the owners; he has in the discharge of his agency applied their money to the purchase of the land and procured a deed to be made, as he understood and intended, to them—they, acting upon the belief that the land was theirs, have sold for a valuable consideration to the plaintiffs. We cannot see how a more perfect equitable title could vest in the plaintiffs. If, as the learned judge thought, the naked legal title still remained in D. S. Miller, certainly no one save the plaintiff can call for it. There are no unadjusted questions between the administrators and the grantors of the plaintiffs, or between W. J. Miller and either of the parties to the transactions; he does not suggest any reason why the plaintiff should not recover save that they are not the real parties in interest. We think that they are the real and only parties in interest, and are entitled to recover the crops. If, however, D. S. Miller was a necessary party, we can see no reason why he should not be brought in now to perfect the record. The action should not have been dismissed. The court may at any time before or after judgment direct other persons to be made parties to the end that substantial [457] justice be done. While it is true that a justice has no power to administer an equity, the owner of an equitable title may sue in the justice's court: Lutz v. Thompson, 87 N. C. 334. Many of the difficulties which obstructed the courts in the administration of justice and necessitated the dismissal of suits because of a divided jurisdiction between courts of law and courts of equity, or the failure to sue out the writ applicable to the right to be enforced, are avoided by the reformed codes of procedure. Courts now seek to ascertain the facts and administer the right to the real party in interest. Amendments are liberally made to enable the court to so mold the judgment that substantial justice is administered. Upon the facts found by his honor judgment should have been entered that the plaintiffs are the owners of the crops in controversy. Judgment will be entered accordingly in the superior court of Orange.

Error.

The Effect of a Deed to a Partnership in the firm name is discussed in Cole v. Mette, 65 Ark. 503, 67 Am. St. Rep. 945; Menage v. Burke, 43 Minn. 211, 19 Am. St. Rep. 235; Frost v. Wolf, 77 Tex. 455, 19 Am. St. Rep. 761; Townshend v. Goodfellow, 40 Minn. 312, 12 Am. St. Rep. 736.

IN RE WILL OF POPE.

[139 N. C. 484, 52 S. E. 484.]

WILLS.—A Witness to a Will may Subscribe her name by holding the pen while another person does the writing, notwithstanding she is herself able to write. (p. 814.)

Issue devisavit vel non on a writing propounded as the will of Elijah Pope. After the witnesses to the instrument had testified it was offered as the will of the decedent, to which the objection was made that one of the subscribing witnesses, Candace Pope, although able to write, did not herself subscribe her name, but authorized the other witness to do so as she held the end of the pen. This objection was sustained, and the propounder appealed.

L. C. Caldwell and Z. V. Long, for the propounder.

J. B. Connelly and R. B. McLaughlin, for the caveators.

[486] HOKE, J. The point which the parties desired and intended to present and which the record does present is thus stated in the case on appeal: "The only question is as to the attestation of the will by one of the subscribing witnesses, C. L. Pope, her name appearing thereon in the normal handwriting of the other subscribing witness, M. L. Miller, and nothing appearing on the face of the paper to show that Miller had authority to sign her name, or that the subscription is not in her handwriting, except from the evidence which is set forth in the case."

On that question the court is of opinion that there was error in the ruling of the judge below; and on the testimony presented, if believed by the jury, the paper writing was properly proven as the last will and testament of Elijah Pope.

In construing the statute as to written wills with witnesses, it is accepted law that the witness must subscribe his name to the paper writing animo testandi, in the presence of the testator, and after the testator has himself signed the same: Ragland v. Huntingdon, 23 N. C. 561; In re Cox's

Will, 46 N. C. 321; Chase v. Kittredge, 93 Mass. 49. And it has been long established that the witness may properly subscribe by making his mark: Pridgen v. Pridgen's Heirs, 35 N. C. 259; Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

Some of the courts have also decided that the witness may subscribe by causing a third person to write the name of the witness in his presence and that of the testator, and without such witness taking any physical part in the act: Jesse v. Parker's Admrs., 6 Gratt. 57, 52 Am. Dec. 102; Smythe v. Irick, 46 S. C. 299, 57 Am. St. Rep. 684, 24 S. E. 69, 32 L. R. A. 77. And [487] the courts of New Hampshire, Kentucky, Kansas and some recent decisions in New York are to the same effect. There is strong authority to the contrary: Riley v. Riley, 36 Ala. 496; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; McFarland v. Bush, 94 Tenn. 538, 45 Am. St. Rep. 760, 29 S. W. 899, 27 L. R. A. 662; Horton v. Johnson, 18 Ga. 396. Our own court does not seem to have passed on this question directly, and it is not necessary to do so in the case before us; for the evidence is to the effect that Candace Pope held the pen during the entire time her name was being written. The witness took part in the physical act of writing her name, animo testandi, in the presence of the testator, at his request, and thus fulfills every requirement for an effectual subscribing witness to a will. Such requirement is stated by an approved writer as follows: "A person, to become a subscribing witness to a will, must sign his name or make his mark, or do some physical act, affixing or recognizing his name, which he intended as a subscription": Martindale on Conveyancing, 2d ed., p. 554. And in Underhill on Wills, volume 1, page 274, it is said that not only a mark with the name of the witness attached, but anything that the witness shall write with intent that it shall stand for his name, shall be a valid signing by him. It has also been held that if the witness puts his name to the paper, animo testandi, he may subscribe by affixing his initials, and his hand may be even guided by another.

If the witness can effectually subscribe in the many modes suggested, it would seem that he could do so when he holds the pen while his entire name and full signature is written. The only reason suggested against the validity of this attestation is the fact that the witness was able to write herself, and it is contended that this kind of signature is only sanc-

tioned when the witness is unable to write, or at most, when temporarily disabled. But the authorities do not support this position. As a matter of fact, in most cases where the witness has been permitted to subscribe in this way, he was [488] unable to write, but this fact was not regarded as essential and should not be controlling. One principal purpose in requiring the attestation of wills is to surround the testator with witnesses who are charged with the present duty of noting his condition and mental capacity. Another is to insure the identity of the instrument and to prevent the fraudulent substitution of another document at the time of its execution. Taking part in some physical act in the presence of the testator by which the name of the witness is affixed to the instrument animo testandi is the essential feature of the requirement: In re Cox's Will, 46 N. C. 321. It is always desirable that a witness who can write his name should be selected and that he should write the signature in his own hand; but this is a matter of convenience in the probate of the paper, more particularly in case of the death of the witness, and does not bear with special force on the act of execution—the res gestae. Thus, in Harrison v. Elvin, 43 Eng. Com. L. 658, where it was urged upon the court that only a witness who could write should be allowed as a subscribing witness, because otherwise the signature could not be proved after his death, Lord Denman rejected the suggestion as controlling, saying that this was only an inconvenience and likely to arise in any kind of an attestation. It is not of the first importance, therefore, whether the witness could or could not write, and the authorities are to the effect that to become an effectual subscribing witness by making a mark, or in the other ways suggested, it is not necessary to show as a prerequisite that the witness was unable to write. In Martindale on Conveyancing, section 190, it is said: "It may be observed that it is not necessary that a party should sign his name; but his mark is sufficient, though he should be able to write." In 3 Washburn on Real Property, 286, we find it stated as follows: "Affixing his mark by the grantor against his name, though written by another, is a signing, though it do not appear that he cannot read or write." These authorities are cited with [489] approval in Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205. In 1 Williams on Executors, 134, it is said that the decisions on the construction of the statute of frauds appear to make it

clear that in case of the witness, as well as the testator, the subscription by mark is sufficient, notwithstanding the witness is able to write. In Jesse v. Parker's Admrs., 6 Gratt. 57, 52 Am. Dec. 102, it is not stated that the witness could not write, and in Smythe v. Irick, 46 S. C. 299, 57 Am. St. Rep. 684, 24 S. E. 69, 32 L. R. A. 77, it expressly appears that the witness could write and it was held that this fact did not affect the principle.

It will be noted that these two last cases are from courts which maintain the position that a subscription can be made without any physical or manual act by the witness at all; but they are apt as authorities on the position now being maintained. The point is expressly decided against the position of the caveators in Baker v. Denning, 43 Eng. Com. L. 335, 80 Ad. & E. 74. The witness, Candace Pope, having taken part in the physical act of writing her name as witness, and this having been done animo testandi at the request of the testator and in his presence, the court is of opinion that she is an effectual subscribing witness to the will, and that this result is not affected by the fact that such witness was at the time able to write her own name.

There was error in the ruling of the court, and a new trial is awarded.

For Authorities bearing upon the principal case, see Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875; McFarland v. Bush, 94 Tenn. 538, 45 Am. St. Rep. 760; Smythe v. Irick, 46 S. C. 299, 57 Am. St. Rep. 684; Appeal of Beaver, 96 Md. 735, 94 Am. St. Rep. 610.

STATE v. DAVIS.

[139 N. C. 547, 51 S. E. 897.]

EAVESDROPPING—Essentials of Offense.—An Indictment for eavesdropping is defective, if it fails to charge that the conduct described is habitual, or facts from which such habit can be inferred, and also fails to allege that anything so heard has been repeated in the presence of divers persons. (p. 817.)

The defendant was indicted under this bill: "The jurors for the state upon their oaths present that Jordan Davis, late of the county of Pitt and state of North Carolina, on the fifteenth day of April, 1905, at and in said county and

state, being a person of evil mind and disposition, willfully and unlawfully did approach the dwelling-house of one L. H. Smith, then and there in the actual possession of one Eva Smith, his wife, in the night-time, peeping in the window, turning the blinds and eavesdropping the conversation and looking into the rooms, to the great terror and disturbance of the family, to the annoyance and inconvenience of the inhabitants of said house, to the evil example of all others in like cases offending, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state." On motion of the defendant, there was judgment quashing the indictment. The state excepted and appealed.

Robert D. Gilmer, attorney general, for the state.

Skinner & Whedbee, for the defendant.

547 HOKE, J. There is no error. Eavesdropping is a criminal offense at common law defined as follows: "Eavesdroppers 548 are such as listen under the walls or windows or eaves of houses to hearken after discourse and thereupon proclaim slanderous and mischievous tales": 4 Blackstone's Commentaries, 168. Mr. Wharton, in his work on Criminal Law, says of the offense that in order to be indictable at common law it should be habitual, and combine the lurking about dwelling-houses and other places where persons meet for private discourse, secretly listening to what is said and then tattling it abroad.

The indictment before us is defective, in that it fails to charge that the conduct described was habitual or facts from which such habit could be inferred, and also fails to allege that anything so heard was repeated in the hearing of divers persons. Mr. Bishop, in his New Criminal Law, describes the offense as a common nuisance in hanging about the dwelling-house of another, hearing tattle and repeating it to the disquiet of the neighborhood. This author, in his New Criminal Procedure, suggests the form of a bill in terms as follows: "That A, late of, etc., and on each and every day thence continually until the day of the finding of this indictment, was, and is, a common eavesdropper, and there continually and on each and all of the days and times did listen about the houses and under the windows and eaves of the houses of the people there dwelling, hearing tattle and repeat-

ing it in the hearing of all persons, to the common nuisance, etc., and against the peace," etc. In commenting on the proof required for conviction, he says it may be desirable, and is perhaps legally necessary, to prove at least three instances of offending, from which, and from the more general evidence, the jury will infer the habit of eavesdropping, wherein probably is the gist of the offense.

There is no error.

Eavesdropping is an indictable common-law offense, and consists in the nuisance of listening under walls and windows or the eaves of houses to hearken after discourse and thereupon to frame slanderous and mischievous tales: State v. Pennington, 3 Head, 299, 75 Am. Dec. 771.

STATE v. HORTON.

[139 N. C. 588, 51 S. E. 945.]

CRIMINAL LAW.—An Offense Malum in Se is one which is naturally evil, while an act malum prohibitum is wrong only because made so by statute. (p. 821.)

CRIMINAL LAW—Malum Prohibitum.—Hunting on premises without the written permission of the owner, which, by a local statute, is made a misdemeanor or punishable by fine, is an offense malum prohibitum. (p. 821.)

HOMICIDE in the Commission of an Unlawful Act.—If a person, while hunting on premises without the written permission of the owner, which, by a local statute, is made a misdemeanor punishable by fine, accidentally kills his companion, the homicide is excusable. (p. 826.)

Robert D. Gilmer, attorney general, for the state.

F. S. Spruill and W. H. Ruffin, for the defendant.

588 HOKE, J. Indictment for manslaughter against W. P. Horton, heard by Judge W. B. Councill and a jury at April term, 1905, of 589 the superior court of Franklin county. The jury rendered a special verdict, and such verdict and proceedings thereon are as follows:

"That in the month of November, 1904, to wit, on the —— day thereof, the defendant, W. P. Horton, was hunting turkeys on the lands of another; that the following local statute, enacted by the General Assembly of 1901, was in force at and in the place in which said defendant was hunting, to wit, chapter 410 of the Laws of 1901; that the said Horton at

the time he was so hunting had not the written consent of the owner of said land or of his lawful agent; that while so engaged in hunting he killed Charlie Hunt, the deceased, but that said killing was wholly unintentional; that the shooting of the deceased was done while the defendant was under the impression and belief that he was shooting at a wild turkey; that the hunting engaged in by the defendant was not of itself dangerous to human life, nor was he reckless in the manner of hunting or of handling the firearm with which the killing was done; that hunting at that season was not forbidden under the general game law of the state, but was prohibited only by the special statute referred to; that the shooting from which the killing resulted was not done in such grossly careless or negligent manner as to imply any moral turpitude, or to indicate any indifference to the safeguarding of human life; that, but for the said statute herein incorporated, the killing of the deceased by defendant does not constitute any violation of the law. If upon the above findings of fact the court should be of opinion that the defendant is guilty of manslaughter, we for our verdict find the defendant guilty of manslaughter, but if the court should be of opinion that the defendant is not guilty, we for our verdict find that the defendant is not guilty." Upon this special finding, the court being of opinion that the defendant was guilty of manslaughter, so adjudged and ordered a verdict of guilty of manslaughter to be entered, and gave judgment that the 590 defendant be imprisoned in the county jail of Franklin for a period of four months. Defendant excepted to the ruling of the court, and appealed from the judgment against him.

It will be noted that the finding of the jury declares that the act of the defendant was not in itself dangerous to human life, and excludes every element of criminal negligence, and rests the guilt or innocence of the defendant on the fact alone that at the time of the homicide the defendant was hunting on another's land without written permission from the owner. The act, which applies only in the counties of Orange, Franklin and Scotland, makes the conduct a misdemeanor, and imposes a punishment on conviction of not less than five nor more than ten dollars.

The statement sometimes appears in works of approved excellence to the effect that an unintentional homicide is a criminal offense when occasioned by a person engaged at the time in an unlawful act. In nearly every instance, however,

will be found the qualification that if the act in question is free from negligence, and not in itself of dangerous tendency, and the criminality must arise, if at all, entirely from the fact that it is unlawful, in such case the unlawful act must be one that is malum in se and not merely malum prohibitum, and this we hold to be the correct doctrine. In Foster's Crown Law it is thus stated at page 258: "In order to bring a case within this description (excusable homicide) the act upon which death ensueth must be lawful. For if the act be unlawful, I mean if it be malum in se, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intent, it will be murder; but if the intent went no further than to commit a bare trespass, it will be [591] manslaughter." At page 259 the same author puts an instance with his comments thereon as follows: "A shooteth at the poultry of B and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent, but if it was done wantonly and without that intention, it will be barely manslaughter. The rule I have laid down supposeth that the act from which death ensued was malum in se. For if it was barely malum prohibitum, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment."

One of these disqualifying statutes here referred to as an instance of malum prohibitum was an act passed (13 Richard II, chapter 13) to prevent certain classes of persons from keeping dogs, nets or engines to destroy game, etc., and the punishment imposed on conviction was one year's imprisonment. There were others imposing a lesser penalty.

Bishop in his work entitled New Criminal Law, volume 1, section 332, treats of the matter as follows: "In these cases of an unintended evil result, the intent whence the act accidentally sprang must probably be, if specific, to do a thing which is malum in se and not merely malum prohibitum." Thus Archbold says: "When a man in the execution of one act, by misfortune or chance and not designedly, does another act for which, if he had willfully committed it, he would be liable

to be punished—in that case, if the act he were doing were lawful or merely malum prohibitum, he shall not be punishable for the act arising from misfortune or chance, but if it be malum in se, it is otherwise. To illustrate: Since it is malum prohibitum, not malum in se, for an unauthorized person to kill game in England contrary to the statutes, if, [592] in unlawfully shooting at game, he accidentally kills a man, it is no more criminal in him than if he were authorized. But to shoot at another's fowls, wantonly or in sport, an act which is malum in se, though a civil trespass, and thereby accidentally to kill a human being, is manslaughter. If the intent in the shooting were to commit larceny of the fowls, we have seen that it would be murder." To same effect is Estell v. State, 51 N. J. L. 182, 17 Atl. 118; Commonwealth v. Adams, 114 Mass. 323, 19 Am. Rep. 362.

An offense malum in se is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act malum prohibitum is wrong only because made so by statute. For the reason that acts mala in se have, as a rule, become criminal offenses by the course and development of the common law, an impression has sometimes obtained that only acts can be so classified which the common law makes criminal, but this is not at all the test. An act can be, and frequently is, malum in se, when it amounts only to a civil trespass, provided it has a malicious element or manifests an evil nature, or wrongful disposition to harm or injure another in his person or property: Bishop's Criminal Law, sec. 332; Commonwealth v. Adams, 114 Mass. 323, 19 Am. Rep. 362.

The distinction between the two classes of acts is well stated in 19 American and English Encyclopedia of Law, second edition, at page 705: "An offense malum in se is one which is naturally evil, as murder, theft, and the like. Offenses at common law are generally malum in se. An offense malum prohibitum, on the contrary, is not naturally an evil, but becomes so in consequence of being forbidden."

We do not hesitate to declare that the offense of the defendant in hunting on the land without written permission of the owner was malum prohibitum, and the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life, and negatived all idea of negligence, we hold that the case is one of excusable homicide, and the defendant should be declared not guilty.

[593] We are referred by the attorney general to East's Pleas of the Crown and Hale's Pleas of the Crown as authorities against this position. We would be slow indeed to hold that the law differed from what these eminent authors declared it to be in their day and time, nor are we required to do so, for a careful examination of their writings will, we think, confirm the views expressed by the court. My Lord Hale does say in volume 1, page 39, that: "If a man do ex intentione an unlawful act, tending to the bodily hurt of any person, as by striking or beating him, though he did not intend to kill him, but the death of the party struck follow thereby within the year and day; or if he strike at one and missing him kill another whom he did not intend, this is felony and homicide, and not casualty or per infortunium. So it is, if he be doing an unlawful act, though not intending bodily harm to any person, as throwing a stone at another's horse, if it hit a person and kill him, this is felony and homicide, and not per infortunium, for the act was voluntary, though the event was not intended, and therefore the act itself being unlawful, he is criminally guilty of the consequence that follows."

But this author says in treating of the same subject, at pages 475, 476: "So if A throws a stone at a bird, and the stone striketh and killeth another to whom he intended no harm, it is per infortunium, but if he had thrown the stone to kill the poultry or cattle of B, and the stone hits and kills a bystander, it is manslaughter because the act was unlawful; but not murder because he did not maliciously or with intent to hurt the bystander. By the statute of 33 Henry VIII, chapter 6, no person not having lands, etc., of the yearly value of one hundred pounds per annum may keep or shoot a gun, upon pain of forfeiture of ten pounds. Suppose, therefore, such a person, not qualified, shoot with a gun at a bird or at crows, and by mischance it kills a bystander, by breaking of the gun or some other accident, that in another case would have amounted only to chance-medley, this will be no more [594] than chance-medley in him; for though the statute prohibits him to keep or shoot a gun, yet the same was but malum prohibitum, and that only under a penalty, and will not enhance the effect beyond its nature."

Mr. East, while he gives an instance which apparently supports the view of the state, in treating further on the subject in volume 1, page 255, says: "Homicide in the prosecution of

some act or purpose criminal or unlawful in itself, wherein death ensues collaterally to or beside the principal intent; I say collaterally to or beside the principal intent in order to distinguish this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpose of the mind was destruction to another. And first it is principally to be observed that if the act on which death ensue be malum in se, it will be murder or manslaughter according to the circumstances; if done in the prosecution of a felonious intent, however, the death ensued against or beside the intent of the party, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter. As where A shoots at the poultry of B, and by accident kills a man; if his intent were to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it were done wantonly and without that intent, it will be barely manslaughter. A whips a horse on which B is riding, whereupon the horse springs out and runs over a child and kills it; this is manslaughter in A and misadventure in B." And again, at page 257: "So if one be doing an unlawful act, though not intending bodily harm to any person, as throwing at another's horse, if it hit a person and kill him, it is manslaughter. Yet in each case it seems that the guilt would rather depend on one or other of these circumstances; either that the act might probably breed danger or that it was done with a mischievous intent."

So we have it, that both Sir Matthew Hale and Mr. East, [595] to whom we were referred as supporting the claim of guilt, declared that the act must be malum in se, and the instances given by them show that these writers had this qualification in mind whenever they state the doctrine in more general terms.

Sir William Blackstone also says in volume 4, pages 192, 193: "And in general when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasions it. If it be in prosecution of a felonious intent, or its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will be manslaughter"; citing Foster's Criminal Law. We take it that the distinguished commentator must have in-

tended only such civil trespasses as involve an element malum in se, as he cites Foster's Criminal Law, and this author, as we have seen, states the qualification suggested.

Again, we are cited by the state to an instance put by East at page 269: "But though the weapons be of a dangerous nature, yet if they be not directed by the person, using them against each other, and so no danger to be reasonably apprehended, and if death casually ensue, it is but manslaughter; as if persons be shooting at game, or butts, or any other lawful object, and a bystander be killed. And it makes no difference, with respect to game, whether the party be qualified or not, but if the act be unlawful in itself, as shooting at deer in another's park without leave, though in sport and without any felonious intent, whereby a bystander is killed, it will be manslaughter; but if the owner had given leave or the party had been shooting in his own park, it would only have been misadventure." Lord Hale, at page 475, gives the same instance. And it is urged that this instance is exactly similar to the one before us, but not so.

According to Sir William Blackstone, in his Commentaries, book 2, page 415: "For some time prior to the Norman Conquest [596] every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests, as is fully expressed in the laws of Canute and Edward the Confessor. Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum." And further on it is said: "That if a man shoots game on another's private ground and kills it there, the property belongs to him on whose ground it was killed. The property arising ratione soli. On the Norman Conquest, a new doctrine took place, and the right of pursuing and taking all beasts of chase or venary, and such other animals as were accounted game, was then held to belong to the king, or to such only as were authorized under him." Again: "But if the king reserve to himself the forests for his own exclusive diversion, so he granted from time to time other tracts of land to his subjects under the name of chases or parks, or gave them license to make such in their own parks. And, by the common law, no one is at liberty to take or kill any beast of chase but such as hath an ancient chase or park." In Encyclopedia Britannica, we read that the chases or parks were much the same except that the parks were inclosed, having a tendency to make the game contained therein more completely and ex-

clusively the property of the owner. Anyone who entered them was a trespasser, and in shooting the game therein his act can be likened to that of the case put by Foster, East and Lord Hale, where one wantonly shot another's chicken. He was engaged in the effort to destroy another's property, and the act could well be considered malum in se. But not so here. We have never transplanted to this country either Saxon or Norman theory as to the right to take and appropriate game. Here it is considered the property of the captor, except, perhaps, in the case of bees.

It is said in Cooley on Torts: "As regards beasts of chase, the English law is that if a hunter shoots and captures a beast on the land of another, the property is in him as in the [597] owner of the land. Under the civil law, the property passed to the captor. And such is believed to be recognized rule in America, even where the capture has been effected by means of a trespass on another's land": State v. House, 65 N. C. 315, 6 Am. Rep. 744.

The act of the defendant, therefore, was not in the effort to destroy another's property, but was strictly malum prohibitum. State v. Vines, 93 N. C. 493, 53 Am. Rep. 466, and State v. Dorsey, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 777, are cases apparently opposed to our present decision, but neither is really so. In State v. Vines, 93 N. C. 493, 53 Am. Rep. 466, the sport was imminently dangerous, amounting to recklessness; and in State v. Dorsey, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 777, the element of criminal negligence was also present, and in this case a state statute governing the construction was given much weight. Neither the one case nor the other required any critical examination of the doctrine as sometimes stated, that an unintentional homicide, occasioned when in the commission of an unlawful act, is manslaughter. The verdict in the case before us negatives both the elements of guilt (present in these two cases), declaring that the act was not in itself dangerous and that the defendant was not negligent.

Again, it has been called to our attention that courts of the highest authority have declared that the distinction between malum prohibitum and malum in se is unsound, and has now entirely disappeared. Our own court so held in Sharp v. Farmer, 20 N. C. 255, and decisions to the same effect have been made several times since. Said Ruffin, C. J., in Sharp v. Farmer, 20 N. C. 255: "The distinction between an act

malum in se and one malum prohibitum was never sound and is entirely disregarded, for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law." It will be noted that this decision was on a case involving the validity of a contract, and the principle there established is undoubtedly correct. The fact, however, that the [598] judge who delivered the opinion uses the words "was never sound," and that other opinions to the same effect use the words "has disappeared," shows that the distinction has existed; and it existed too at a time when this feature in the law of homicide was established. And we are well assured that because the courts, in administering the law on the civil side of the docket, have come to the conclusion that a principle once established is unsound and should be rejected, this should not have the effect of changing the character of an act from innocence to guilt, which had its status fixed when the distinction was recognized and enforced.

It was further suggested that the homicide was one of the very results which the statute was designed to prevent, and to excuse the defendant would be contrary to the policy of the act. But this can hardly be seriously maintained. It will be noted that it was not the owner of the land who was killed, but the defendant's comrade in the hunt; and of a certainty, if our legislature thought that conduct like that of the defendant was dangerous and the statute was designed to protect human life, some other penalty would have been imposed than a fine of "not less than five dollars and not more than ten." It is more reasonable to conclude that the act in its purpose was designed to prevent and suppress petty trespasses and annoyances, such as leaving open gates, throwing down fences, treading over crops, etc.

The special verdict having established that the act of the defendant was entirely accidental, it is a relief that we can declare him innocent in accordance with accepted doctrine, and that in the case at bar the law can be administered in mercy as well as justice. Quoting again from that eminent judge and humane and enlightened man, Sir Michael Foster: "And where the rigor of law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of the judges to be perpetually hunting after forfeitures, where the heart is free from guilt. They are [599] ministers appointed by the crown for the ends of public

justice, and should have written on their hearts the solemn engagement his majesty is under to cause law and justice in mercy to be executed in all his judgments." We know that in this spirit the judge below dealt with the defendant and his cause; for though the judgment of his honor impelled him to the conclusion of guilt, he imposed the lightest punishment permissible for the offense.

There was error in holding the defendant guilty, and, on the facts declared, a verdict of not guilty should be directed and the defendant discharged.

Reversed.

Walker, J., concurs in result only.

Unintentional Homicide in the commission of an unlawful act is the subject of a monographic note to Johnson v. State, 90 Am. St. Rep. 571-583.

SPRINKLE v. WELLBORN.

[140 N. C. 163, 52 S. E. 666.]

INSANE PERSONS.—The Contracts of Idiots, Lunatics, and other persons non compos mentis are generally regarded, in a certain sense, as invalid. (p. 834.)

INSANE PERSONS.—Contracts Entered into by a Person apparently sane, before the fact of insanity has been judicially established, are at most voidable, and will not be set aside if the other party had no notice of the insanity, has derived no inequitable advantage, and the parties cannot be placed in statu quo. (p. 834.)

INSANE PERSONS—Presumption of Fraud.—When a contract is entered into with an insane person, the law presumes fraud from the condition of the parties. The presumption is raised, without the aid of any evidence of actual imposition, from the very nature of the transaction, and is stronger or weaker according to the position or condition of the parties with respect to each other. (p. 835.)

INSANE PERSONS—Cancellation of Deed.—A court of equity has power to grant relief to an insane grantor, if no real injustice is thereby done to the grantee, and no superior equity has intervened in favor of a third person, but the grantor is not entitled to a rescission and cancellation of his deed as a matter of right. (p. 835.)

INSANE PERSON.—A Purchaser for Value and without notice from the grantee of an insane person takes a good title. But the insane person is not without a remedy, for he may proceed against his own immediate grantee, who had notice, for a personal judgment, and hold him responsible for the consideration paid him, which stands for the land. (p. 838.)

INSTRUCTIONS.—A Judge is not Obliged to Repeat his instructions already given, even when specially asked to do so in a prayer. (p. 841.)

INSANE PERSONS.—A Person has Mental Capacity sufficient to contract if he knows what he is about. The measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not the ability to act wisely or discreetly, nor to drive a good bargain. (p. 841.)

Shepherd & Shepherd and T. B. Finley, for the plaintiff.

W. W. Barber, R. A. Doughton and Manly & Hendren, for the defendant.

165 WALKER, J. This action was brought by the plaintiff, Nancy Elvira Sprinkle, who is represented by her guardian, W. R. Sprinkle, against the defendant, J. M. Wellborn, to set aside a deed made by the said Nancy Elvira Sprinkle to the defendant Wellborn on the nineteenth day of October, 1886, for want of mental capacity to make the same, and for fraud and undue influence in procuring the execution of the said deed. Issues were submitted to the jury which, with the answers thereto, 166 are as follows: 1. Did Nancy E. Sprinkle, at the time of executing the deed of October 19, 1886, have sufficient mental capacity to make the same? A. No. 2. If Nancy E. Sprinkle had not sufficient mental capacity at such time to make such deed, did J. M. Wellborn have notice of it? A. Yes. 3. Was any fraud or undue influence practiced on Nancy E. Sprinkle by J. M. Wellborn, to induce her to make such deed? A. No. 4. What was the amount of the benefit derived by Nancy E. Sprinkle from the consideration for the deed to the River farm? A. (By consent.) Twelve hundred and ninety-nine dollars (the amount of the Salmons mortgage debt), the value of the Mountain or Miller tract of land, the value of the cattle delivered to her, and all as of date October 19, 1886. 5. What was the value of the River farm, October 19, 1886? A. Four thousand dollars. 6. What has been the average annual rental value of said River farm since October 19, 1886? A. Two hundred dollars. 7. What was the value of the Mountain or Miller tract October 19, 1886? A. Fifteen hundred dollars. 8. What has been the average rental value of said Mountain or Miller tract since October 19, 1886? A. Seventy-five dollars. 9. What was the value of the cattle received by Nancy E. Sprinkle in said trade? A. Seventy-

five dollars. 10. If the said Nancy E. Sprinkle had not sufficient mental capacity to make said deed, did the defendant Greenwood have notice thereof? A. (By consent.) No. 11. Was the defendant Greenwood a purchaser for value without notice of any fraud on the part of Wellborn to procure the deed to himself, if any such was practiced? A. (By consent.) Yes." There was no objection to the issues. It is not necessary to state the evidence. It was voluminous, but the only material portion of it will be stated in the opinion.

The defendant requested the court to give a number of instructions, all of which were given except those numbered 3, 13 and 14, which will be noticed hereafter. The material instructions given in response to the defendant's prayers, upon the issue as to mental capacity, were as follows: "1. [167] The law fixes no particular standard of intelligence necessary to be possessed by parties in making a contract, and although a person may not have sufficient intelligence to manage his affairs in a proper and prudent manner, still he may be capable of making a binding contract. 2. It is not required that a person should be able to make a disposition of his property with judgment and discretion. It is sufficient if he understands what he is about. If a person knows what he is doing and is aware of the nature of the particular transaction, such person has sufficient mental capacity to make a contract, although that person may not act wisely or discreetly, or make a good bargain. 3. If the jury find from the evidence that on the 19th of October, 1886, Nancy E. Sprinkle had sufficient mental capacity to understand what she was about and the nature and extent of the property when she executed the deed, and that she understood the nature and effect thereof, they will answer the first issue yes, although they also find from the evidence that she was eccentric and that her mind was weak and flighty, and that the trade she made was not a prudent one and was not made in the exercise of discretion and good judgment. 4. If the jury find from the evidence that at the time the deed was executed, to wit, October 19, 1886, Nancy E. Sprinkle had sufficient mental capacity to understand and appreciate that she was making a deed by which she passed the title to the River farm to the defendant Wellborn, that she was depriving herself of the ownership and control thereof, and that she was getting in exchange therefor the farm in Ashe county and the cattle mentioned in the evidence, and that the

mortgage to Salmons was to be paid by the defendant, then they will answer the first issue yes, although they may also find that it was not a prudent trade and was not made with discretion and good judgment. 5. Mere weakness of mind and susceptibility to undue or fraudulent influences, however clearly shown, will not vitiate a contract unless it was induced [168] by fraud. Where there is a legal capacity there cannot be an equitable incapacity apart from fraud. If a person be of sound mind, he has the right to dispose of his property, and his will stands in place of a reason, provided the contract justified the conclusion that he exercised deliberate judgment such as it is and has not been circumvented or imposed upon by artifice or undue influence which amounts to fraud." The following instructions, which the defendant requested the court to give the jury, were refused: "1. Unless the mind of such person is wholly incapable of any reflection or deliberate act, so that in fact he was unaware of the nature and effect of the particular transaction, such person, in the eye of the law, has sufficient mental capacity to make a contract; 2. Upon all of the evidence, the jury is instructed that the defendant Wellborn did not have notice of any mental incapacity of Nancy E. Sprinkle, if any such existed; 3. The jury will answer the third issue no." The court then charged the jury generally as follows: "Those who allege insanity, idiocy, imbecility and incapacity must prove it by the greater weight of the evidence; must overcome the legal presumption of soundness of mind. Has the plaintiff overcome this presumption of law? If so, you will answer the first issue no, and thereby declare that, when she made the deed, Elvira Sprinkle did not have that mental capacity which the law requires of those who dispose of their property. The law does not require that a person be able to dispose of his or her property with judgment and discretion, or be able to get the best of a trade. It is sufficient in law if he or she understands what he or she is doing and what they are about. The law does not require a high degree of intelligence, but it does require sufficient mind to know and comprehend the character of the act and to know what one is doing. Did Elvira Sprinkle, when she made the deed to the River farm, know what she was about; know the effect of the instrument she was signing; know that she was parting with her land [169] and getting the land in Ashe county and the cattle and

the payment of the mortgage in return? If she did not fully comprehend this, you will answer the issue no; otherwise you will answer it yes. You understand, of course, that you are inquiring into the contract of Elvira Sprinkle on October 19, 1886. Was she sound then and of sufficient mental capacity to make the deed on that day? Where one has sufficient mental capacity at the time he signs the deed to understand the nature and extent of the property disposed of, and the force and effect of his act in signing the deed, then he is capable of executing a deed. If you find that Nancy Sprinkle, at the time she signed the deed on the 19th of October, 1886, had mind and intelligence sufficient to enable her to have a reasonable judgment of the kind and value of the property embraced in the deed, and to understand the effect of her act in making the deed, you should answer the first issue yes. But if you should find that she did not have such mind and intelligence as stated, you will answer the first issue no."

The court instructed the jury on the law applicable to the other issues, recapitulating the evidence by grouping the same as applicable to the different issues, and explained the law arising thereon. The court instructed the jury as to the difference between substantive evidence and corroborating and impeaching evidence, and then instructed them further as follows: "The evidence of statements made in this case by witnesses other than the parties to this suit, different from and inconsistent with the testimony given by such witnesses on this trial, was allowed only for the purpose of impeaching such witnesses, and is not to be considered as substantive evidence. Evidence of the statements of witnesses, which accord with their evidence on the trial, is only allowed for the purpose of corroborating such witnesses, and is not to be considered by the jury as substantive evidence." After the verdict was returned, the court found that the answer of the [170] jury to the third issue was against the weight of the evidence, and set it aside; and that, upon the responses to the other issue, there was fraud in law. The court thereupon answered the third issue "Yes." The defendant excepted. During the trial the plaintiff introduced in evidence the record entitled, "In the Matter of Inquiry into the Mental Condition of Nancy E. Sprinkle," which was a proceeding instituted in 1893, under the statute, the record showing the appointment of W. R. Sprinkle as her guardian. In the said proceeding, the jury found that she was "incompetent to man-

age her own business." The plaintiff then introduced the record in the case of Nancy Sims, by Her Guardian, v. W. M. Sims, in which her marriage to the defendant was annulled by a judgment of the court based upon the verdict of a jury that she did not have sufficient mental capacity to enter into the contract of marriage. The records were each duly objected to by the defendant. The objections were overruled and the defendant excepted. The records were offered solely for the consideration of the court, and in respect to them the following facts are stated: "The court held that these records were admitted only for the purpose of consideration by the court upon the question whether or not the defendant Wellborn was competent to testify as to the conversations and transactions between himself and the plaintiff—the objection to his competency being that she was now a lunatic, and the court so stated in the presence of the jury."

The defendant then introduced the record of the second inquiry into the sanity of Nancy Sims, dated August, 1895, in which the jury found that she was sane and "competent to transact the ordinary business of life." The plaintiffs contended that the records they introduced should be admitted as evidence for the jury to consider, and the defendants insisted that the records they introduced should be admitted in the same way. The judge excluded all the records as evidence for the jury, but stated that if he should [171] decide later to admit the records as evidence, he would so announce. The court did not decide to admit them as evidence. The defendant then read the deposition of Governor Glenn. After the close of the evidence, and while one of the counsel was addressing the jury, an attorney for the plaintiff came up to the bench and said to the judge that as Governor Glenn's deposition had been introduced, he thought the court ought to allow the records to go to the jury as evidence, and wanted to know if the court would let him argue to the jury that they were evidence. The court said "No," that those records were not in evidence, and that he must not refer to them in argument. The judge was engaged, during the arguments, in preparing instructions and considering the prayers for instruction handed up to him just before the argument commenced, and did not pay any attention to the arguments of counsel, and did not know until after the verdict had been rendered that counsel in their arguments had referred to the said records as evidence; but the court finds, after hearing

the evidence of the attorneys, that one of the four attorneys for the plaintiff who addressed the jury (but not the one referred to above), in his argument, did refer to the said records as evidence, and that the attorneys for the defendant also in their reply referred to the said records as evidence and discussed the same. The attention of the court was not called to this, nor any objection made to it during the argument; but the defendant, after verdict, called the court's attention to it, and moved to set aside the verdict on that ground. The counsel for the plaintiff, who referred to the records as evidence, had not been advised of what the court had said to his associate, neither had the counsel for the defendant.

There was a motion for a new trial based upon errors committed during the progress of the trial and objections to the argument of counsel, as appears in the finding of the court, which motion was overruled. Judgment for the plaintiff and the defendant appealed.

172 The jury found in this case, by consent, in their answers to the tenth and eleventh issues, that the defendant, T. J. Greenwood, had purchased the land in controversy for value and without notice of the mental incapacity of Nancy Elvira Sprinkle, and also without notice of any fraud of Wellborn, if there was any, in procuring the deed. Counsel for the plaintiff properly admitted that, under this finding, they could not proceed further against Greenwood, and the cause was therefore continued against Wellborn on the theory that, upon the verdict, he is liable for the value of the land, less the amount paid by him therefor, and for the difference between these two amounts judgment was rendered in the court below. There is no serious contention, as we understand, that the defendant is not so liable, if the rulings of the court, as to all issues except the third, and consequently the verdict and the judgment, are free from error and can be sustained, though it was suggested that the liability was not so clearly apparent as to be conceded or taken for granted, without any good reason given or any authority cited to establish it. We will, therefore, consider this question before passing to the discussion of the other matters. The first essential element of a contract is consent, and there can be no true agreement without the capacity to understand it and freedom to accept or to reject the terms proposed. The parties must be able and willing to contract. If, therefore, one per-

son induces another, who lacks this capacity or this freedom, to enter into an apparent contract, equity will not recognize the transaction, however, as one author says, it may be fenced by formal observances, but deeming it fraudulent, will in proper cases afford relief against it at the suit of the party [173] imposed upon: Fetter on Equity, 143. On this ground the contracts of idiots, lunatics and other persons non compos mentis are generally regarded, in a certain sense, as invalid. It has been said by many courts that the contracts of a lunatic made after the fact of insanity has been judicially ascertained are absolutely void, and that he can have no power to contract at all until there is a reversal of the finding and he is permitted to resume control of his property: Fetter on Equity, 143; Odom v. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 10 S. E. 609, 7 L. R. A. 118. We need not decide what is the law in this respect, as there had been no inquisition of lunacy at the time the deed in this case was executed. We will have occasion, though, to advert to the nature and effect of such an inquisition hereafter in discussing another question. In regard to a contract entered into by a person apparently sane, before the fact of insanity has been judicially established, the law is well settled, we believe, that such contracts are at most only avoidable, and will not be set aside when the other party to be affected by the decree of the court had no notice of the fact of insanity, has derived no inequitable advantage, and the parties cannot be placed in statu quo. The reason for this distinction between contracts made when there has been office found and those when there has not is said by the authorities to be plain. "Insanity is one of the most mysterious diseases to which humanity is subject. The ripest professional skill and the keenest observation sometimes fail to detect it in its incipient stages. Sound law and good morals, therefore, alike forbid the rescission of a contract on the ground of insanity by one who is unable or unwilling to restore the property acquired thereunder to the other party, who entered into it in good faith, in entire ignorance of the insanity, and without taking any advantage by reason thereof": Fetter on Equity, 143, 144; Eaton on Equity, 316. "The mere fact that a man is of weak understanding, or is below the average of mankind in intellectual capacity, is not of itself an adequate ground [174] to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. But where

mental weakness is accompanied by other inequitable incidents—such as undue influence, great ignorance and want of advice, or inadequacy of consideration—equity will interfere and grant either affirmative or defensive relief": Eaton on Equity, 317. In the case of an insane person, one wholly incompetent to contract, the law presumes fraud from the condition of the parties, the same as it does in the case of a contract of a person under duress or undue influence, or of contracts between persons occupying a fiduciary relation. The presumption is stronger or weaker according to the position or condition of the parties with respect to each other. Fraud vitiates all contracts, but, as a general rule, it is not presumed but must be proved. Proof is not dispensed with, but there are certain well-defined relations as there are certain facts when established, from which the law presumes fraud, and which, though not necessarily binding upon the jury, may answer as plenary proof of the fraud unless the innocence of the party charged with its commission in some way appears: Lee v. Pearce, 68 N. C. 76.

In the classification of frauds in which a court of equity takes cognizance, the kind which is said to be presumed from a transaction with a lunatic is to be referred to the well-known head of constructive frauds: Eaton on Equity, 314. Lord Hardwicke, for the purpose of convenient consideration, divided the subject of fraud into four classes: "1. Fraud arising from the facts and circumstances of imposition; 2. Fraud arising from the intrinsic matter of the bargain itself; 3. Fraud presumed from the circumstances and condition of the parties contracting; 4. Fraud affecting third persons not parties to the transaction": Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125. This classification has generally been adopted.

Our case falls under the third head, as does also a contract
175 with a person so far drunk that he is substantially non compos mentis and not capable of apprehending the effect of what he does. The presumption is raised without the aid of any evidence of actual imposition, from the very nature of the transaction: Adams on Equity, 5th Am. ed., sec. 182, pp. 364, 365; Bispham on Equity, 3d ed., sec. 230; Eaton on Equity, 314; Fetter on Equity, 143; Odom v. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 10 S. E. 609, 7 L. R. A. 118; Cameron Barkley Co. v. Thornton etc. Power Co., 138 N. C. 365, 107 Am. St. Rep. 532, 50 S. E. 695. Lord Hard-

wicke, in the case from Vesey we have cited, says: "A third kind of fraud is that which may be presumed from the circumstances and conditions of the parties contracting; and this goes further than the rule of law, which is that it must be proved, and not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance." It results from these authorities if we bring the facts of this case to the test of the principles stated in them, that the finding of the jury upon the first and second issues was quite sufficient to invest the court with the power and to induce it to set aside the deed to Wellborn, if no real injustice is thereby done to him and no superior equity has intervened in favor of a third party, for the plaintiff is not entitled to rescission and cancellation as matter of right, because the the granting of that relief rests in the sound discretion of the court and it will not decree such relief if it will work any injustice in the particular case: Bispham on Equity, sec. 475. The equity will not always be enforced, for instance in a case where the status quo ante as stated and illustrated in Odom v. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 10 S. E. 609, 7 L. R. A. 118, cannot be fully restored. No such consideration, though, is present in this case, as the very nature of the particular relief which is sought will permit the administration of such equitable relief with even and exact justice to all parties. Greenwood is found to be a purchaser for value and without notice, and is entitled to the special favor and protection of a court of [176] equity. The deed to him must be upheld as effectual to vest a good and indefeasible title, not only as against his vendor, but also as against the plaintiffs, for his equity is superior to theirs. But this does not deprive the plaintiffs of all relief. It is a familiar principle that when a fraudulent vendee has conveyed the property in question to a third party who, by reason of his innocence, acquires a good and valid title as against the equity of the original vendor, the latter has a remedy against the substituted property—in this case the purchase money received from Greenwood—and the defendant will be held liable for the amount thereof subject to any deductions for sums paid to the plaintiff at the time the deed was made and to any other payments rightfully made by him to protect the title, such as the one made in this case to dis-

encumber the land. Upon this principle was the judgment of the court rendered, and we think that it works out the equity of the plaintiff and at the same time does full justice to the defendant. In this respect this case is unlike that of Odom v. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 10 S. E. 609, 7 L. R. A. 118. That the plaintiff was entitled to proceed against the defendant for a personal judgment is settled by the highest authority. Smith, in his admirable Treatise on the Equitable Remedies of Creditors, at pages 28 and 29, when speaking of a fraudulent conveyance, says: "1. The remedy of a creditor is not defeated where the fraudulent grantee has sold the property to an innocent purchaser, for in such case the proceeds of the sale are as available as the property itself. The fraudulent grantee becomes chargeable with the proceeds derived from the innocent purchaser, but the property itself is not. 2. It is not essential that the precise property fraudulently conveyed shall remain in the hands of the fraudulent grantee to entitle the plaintiff to a recovery. Thus, the grantee may have exchanged the fraudulently conveyed property for other property still held by him, in which case the fraud will be impressed upon the latter property in lieu of the former. 3. Where it is sought to [177] follow property fraudulently conveyed and procure a decree against the property, which is subsequently reversed, complainants are not precluded from taking a different course and procuring a different decree based on the evidence on final hearing, such as a personal decree against the fraudulent grantee": See, also, 1 Pomeroy's Equity Jurisprudence (1905), secs. 237, 240. In Texas v. Hardenberg, 77 U. S. (10 Wall.) 68, 19 L. ed. 839, Chase, C. J., for the court, says: "It may be admitted that these allegations and interrogatories do not assert the right of the complainant to the proceeds with absolute directness and distinctness. The bill might have been drawn better. But we think it would savor of extreme technicality to refuse to see in the bill enough in relation to the proceeds of the bonds to warrant relief in this respect under the general prayer. Willing to allow this defendant the benefit of any defense consistent with the rules which govern proceedings in equity, we have looked into the question as if it were still open. Having thus looked into it, we find no sufficient ground for altering the conclusion embodied in the decree." The last expression of the court refers to a clause in the decree awarding a recovery of the

proceeds of the bonds which had been sold: Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. Rep. 685, 32 L. ed. 1077. The rule and the reason for it are clearly and tersely stated by Earl, J., in Murtha v. Curley, 90 N. Y. 378: "A court of equity adapts its relief to the exigencies of the case in hand. It may restrain or compel the defendant; it may appoint a receiver or order an accounting; it may decree specific performance or order the delivery to the plaintiff of specific real or personal property; or it may order a sum of money to be paid to the plaintiff and give him a personal judgment therefor." When the property has been converted, as in this case, there is no longer any need for a decree vacating the fraudulent deed, but the court will simply declare that the deed is void as between the plaintiff (Nancy Sprinkle) and her fraudulent grantee, and award such relief as is proper [178] in the premises. Wellborn having sold the land to a bona fide purchaser, and thereby deprived his vendor of the land itself, and, having received the price, he must, by reason of his fraudulent disposition of the property, which he is considered to have held in trust and of its conversion into money, be held responsible for the amount of the consideration paid to him. The money in his hands stands for the land: Wait on Fraudulent Conveyances, 3d ed., sec. 178; Holland v. Anderson, 38 Mo. 55; Lawrence v. Bank of Republic, 35 N. Y. 320; Dilworth v. Curts, 139 Ill. 508, 29 N. E. 80; Hazen v. Lydonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680, 41 Atl. 1046. But the administration of this relief is eminently proper under the reformed procedure where the rights of parties are settled and determined in one action, the distinction between actions at law and suits in equity having been abolished: Pomeroy's Equity Jurisprudence, sec. 242. Our conclusion, therefore, is that by the verdict of the jury upon the issues, excluding altogether the third issue, the plaintiffs were entitled to the relief which was adjudged to them. The third issue was submitted only to ascertain whether there had been any actual fraud or undue influence used to obtain the deed, should the jury have found that Nancy Sprinkle was not insane—that is, devoid of all mental capacity—but merely weak-minded and an easy prey to the domination and overruling influence of the defendant, who availed himself of her weakness and of his power over her to secure the execution of the deed to himself by undue means, thus presenting an alternative equity for the rescission and cancellation of the deed.

The issue was in no way essential to the relief granted, as the jury found not only that there was want of sufficient mental capacity, but that the defendant knew of it at the time he got the deed, and in addition thereto that he obtained the land at an under-value. It seems to us that it would be a reproach to the law and to the administration of justice under its forms if such a transaction were permitted to stand. But we do not think there can be found in the [179] books any principle which would cause us to hesitate in the least, so far as this objection is concerned, to pronounce its condemnation and to sustain the judgment of the court, which requires the defendant to surrender any gain or benefit he has derived from it.

It follows from what we have already determined that the action of his honor in striking out the answer of the jury to the third issue and substituting one of his own has resulted in no legal wrong to the defendant which requires a reversal or even a modification of the judgment. There was error in doing so, but not reversible error. The court had the power to set aside the verdict, as to that issue—that is, pro tanto—but none to reverse the answer of the jury. This was an invasion of their province, but the defendant cannot complain of it, as it worked no material injury in law to him. The order setting aside the verdict upon that issue is sustained, as the court merely exercised its discretion to that extent, but in other respects it is reversed and the answer of the court to that issue will be expunged. That is but just to the defendant. The court, as it appears in the record, was induced to take the course it did under the belief that, as the answers to the other issues showed "fraud in law," the proper answer to the third issue should be an affirmative one. In this there was error, as we have said, but the judgment is not affected by it, and the case is left as if that issue had not been submitted at all.

The objection to the records of the inquisition of lunacy is untenable. The case shows that they were introduced for the consideration of the court alone, in order to decide upon the competency of a witness, and this was fully explained to the jury. If counsel of plaintiff commented upon them, no objection was made at the time, and, not having been made then, it cannot be made now: State v. Tyson, 133 N. C. 692, 45 S. E. 838; Horah v. Knox, 87 N. C. 483. Besides, the defendant's counsel, instead of calling the court's attention to

those [180] comments, replied to them himself, and it must be taken, therefore, that any objection to them as being improper was thereby waived. The defendant cannot be permitted to take two chances. He should have acted promptly if he intended to avail himself of any objection to what plaintiff's counsel said to the jury about the records. It may well be doubted if the recent rule of this court, Rule 27 (135 N. C. 600), is not also a full answer to this objection. Those records, of course, were not, and could not have been, considered as evidence for the jury. They were made after the date when the deed was executed and the proceedings in which they were made were ex parte. If made before that time, they might have been competent, but not conclusive as to the insanity of Nancy Sprinkle. The presumption arising from them in such a case could be rebutted and the very truth be made to appear—that is, that while they showed insanity, it did not in fact exist at the time the deed was executed. This is at least true as to all persons not parties or privies to the inquisition, as, for example, a grantee of the lunatic, who being a stranger to the inquisition could not traverse it, which was formally done by scire facias: Rippy v. Gant, 39 N. C. 443; Arrington v. Short, 10 N. C. 71; Christmas v. Mitchell, 38 N. C. 535; Parker v. Davis, 53 N. C. 460. The doctrine is fully discussed and the reasons for the same fully and clearly stated by Taylor, C. J., in Armstrong v. Short, 8 N. C. 11. But it is useless to discuss the matter any further, as the records were not admitted as evidence generally, and the court has done nothing, nor has it failed to do anything with respect thereto, of which the defendant has any right to complain. The record in the case of Sims v. Sims, 121 N. C. 297, 61 Am. St. Rep. 665, 28 S. E. 407, 40 L. R. A. 737, was clearly incompetent as substantive testimony. It was properly excluded.

The defendant's third prayer for instructions was properly refused. The substance of it had been given by the court in its response to his first and second prayers, and afterward, [181] in its general charge to the jury, the defendant was given the full benefit of the principle stated in his third prayer. A judge is not obliged to repeat his instructions already given, even when specially asked to do so in a prayer. The instructions as given were quite sufficient to cover the case: Bost v. Bost, 87 N. C. 477; Morris v. Osborne, 104 N. C. 609, 10 S. E. 476. We have said in Cameron Barkley Co. v.

Thornton etc. Power Co., 138 N. C. 365, 107 Am. St. Rep. 532, 50 S. E. 695, which sustains the charge of a court, that this court has adopted Coke's definition, that a person has mental capacity sufficient to contract if he knows what he is about (Moffit v. Witherspoon, 32 N. C. 185; Paine v. Roberts, 82 N. C. 451), and that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. There is no particular formula to be used in such cases, as said by the court in Morris v. Osborne, 104 N. C. 609, 10 S. E. 476, but the law in this respect should be explained to the jury with reference to the special and peculiar facts of the case being tried, and under the guidance of such general principles as have been settled and declared by the courts.

The remaining exceptions to be noticed were taken to the refusal of the court to instruct the jury as requested by the defendant in his thirteenth and fourteenth prayers, and to the giving of the instruction requested in the fourth prayer of the plaintiff. The last two relate to the third issue, and as that issue has practically been eliminated from the case by the view we have taken of the law in respect to the verdict upon the other issues, there is no need of giving them further consideration, as they have become immaterial, and any error committed as to them, if error there be, was harmless. So that we come finally to the question raised by the refusal [182] to give the instruction contained in the defendant's thirteenth prayer. Was there any evidence that the defendant had notice of the incapacity of Nancy Sprinkle at the time she made the deed to him? We think there was not only some but ample evidence to sustain the finding of the jury. We forbear to discuss the evidence at length or in detail for the purpose of showing that it was sufficient to support the verdict of the jury. It appears that the defendant was a kinsman and neighbor of Nancy Sprinkle and had known her all his life, with the exception of a few years when he was in the west. He knew the condition of her mind. It is true he says he did not know she was insane, but the jury were not bound by this statement, and might well conclude, in view of his knowledge of her when considered in connection with

the overwhelming proof as to her mental imbecility, and especially when coupled with other facts and circumstances tending to show his guilty knowledge, that he must have been aware of her true mental condition. Other circumstances are that at the time she made the trade with him her mind was so unbalanced that, in the language of one of the witnesses, "she was wild and hardly seemed to know her whereabouts." The manner in which he procured the deed, taking her away from those who could have advised her in so important a transaction, and stating that he would not trade with her unless Fletcher Harris, her friend, was present, and that he was only going to the upper part of the county to get some evidence for her in her pension matter, when it turned out he was then preparing to carry her to Wilkesboro for the purpose of taking advantage of her mental weakness by inducing her to make the deed, and this he easily accomplished; her sudden change of mind when she had just told Parks that she would not make the deed—all this, and more, was evidence for the jury upon the question of her mental capacity. So weak was she that she was completely subjected to the [183] power and dictation of the defendant, and he must have known it if the testimony introduced by the plaintiff was credible, and the jury have said that it was. If there was any mental operation required in the transaction, it was all on his side. It seems that he could, at pleasure, mold her will to suit his own, so like was she to clay in the hands of the potter. It is needless to prolong the discussion. To be sure, there was evidence in conflict with that offered by the plaintiff, but we are considering the version of the facts relating to the first and second issues, which was apparently accepted by the jury as the true one, and, besides, we are only required to decide whether there was any evidence of the facts to be proved, namely, the insanity and the defendant's knowledge of it.

Whether there is any difference, in moral quality, between the act of obtaining a deed for land from a woman known to be totally bereft of reason and the act of procuring one from a woman merely of weak understanding, who is unable to guard herself against imposition or to resist importunity, it does not lie within our province to decide, but in law, and in so far as the validity of such transaction may be involved, we know that there is not, and should not be, any difference, and that either is sufficient to induce a court of equity to

rescind the contract and cancel the deed, or to require the vendee to give up what he has unfairly and unjustly received, with proper deductions for any sums paid out by him, if the specific remedy of rescission and cancellation cannot equitably be administered.

There being no error in any of the rulings of the court to which exception has been taken, the verdict must stand undisturbed, and, excluding from consideration the third issue, what is left of it is certainly sufficient to warrant the judgment: 1 Bigelow on Fraud, 374; Pomeroy's Equity Jurisprudence (1905), sec. 947. As suggested by counsel, a court of equity would [184] abdicate one of its most important and characteristic functions if it were to give effect to a transaction conducted under such circumstances as those established by the issues left standing by the court.

No error.

The Deed of an Insane Person is usually regarded as voidable merely, and not void: Blinn v. Schwartz, 177 N. Y. 252, 101 Am. St. Rep. 806, and cases cited in the cross-reference note thereto; note to Flach v. Gottschalk Co., 71 Am. St. Rep. 430-433. Compare, however, Walker v. Winn, 142 Ala. 560, 110 Am. St. Rep. 50. And, if the grantee has acted in good faith and without notice, perhaps the conveyance cannot be set aside without first doing equity: Moran v. Moran, 106 Mich. 8, 58 Am. St. Rep. 462; Eldredge v. Palmer, 185 Ill. 618, 76 Am. St. Rep. 59. In Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468, it is affirmed that the deed of an insane person may be avoided as against his grantee without notice, and as against an innocent purchaser from such grantee, without restitution of the consideration paid by the last purchaser.

JONES v. CASUALTY COMPANY.

[140 N. C. 262, 52 S. E. 578.]

INSURANCE—Construction in Favor of Insured.—In construing insurance policies, all doubts are resolved in favor of the insured. If a policy is reasonably susceptible of two constructions, that one will be adopted which is most favorable to him. (p. 845.)

CONTRACTS—Repugnant Clauses.—While clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet a proviso utterly repugnant to the body of the contract and irreconcilable with it will be rejected. (p. 845.)

INSURANCE—Blood Poisoning—Repugnant Clauses.—If the main part of an insurance policy contains a definite indemnity against disability arising from blood poisoning, subsequent provisos entirely withdrawing blood poisoning from the operation of the policy are repugnant to the body of the contract and unenforceable. (p. 845.)

Action on a policy of insurance for an indemnity of five dollars a week for twenty-six weeks.

D. E. Hudgins, for the plaintiff.

J. W. Pless, for the defendant.

[263] HOKE, J. A jury trial was waived, and from the findings of fact by the court it appeared that the plaintiff, being the holder of an ordinary health policy in defendant company, on the twenty-ninth day of November, 1902, received a small scratch on the hand; that the same began to inflame, blood poisoning developed, and on December 3, 1902, the plaintiff's arm was of necessity amputated; that the plaintiff was rendered incapable of performing any kind of manual labor and continued so disabled for a term of twenty-six weeks, for which time he sues for the stipulated indemnity; that all the former preliminary requirements have been complied with on the part of the plaintiff, and proof of the plaintiff's disability for twenty-six weeks duly filed with defendant company. There was judgment for the plaintiff at the contract rate and the defendant excepted and appealed.

The policy, section 4, contains a definite stipulation for indemnity at five dollars per week, not to exceed twenty-six weeks, in case of disability arising from certain specified diseases, blood poisoning being one expressly named. This disease being evidently the direct and controlling cause of the disability, as a matter of first impresssion, the right of the plaintiff to recover would seem to be clear. The policy, however, having given this assurance of indemnity, then takes up the matter of provisos by way of restriction and stipulates further: 1. That this policy shall not apply to any [264] illness or disease whatever except those named; 2. That it shall not apply to any disease which is complicated with, or results from any disease not herein named, etc.; 3. Nor to any disease or illness which results from injury, etc.; 4. Nor in effect to any disease which develops or results from those diseases that are named, etc.

There are many other limitations and restrictions in the policy, for as my Lord Coke would say, the "etc." meaneth much; but those set out are enough to show that if these provisos can prevail, blood poisoning is entirely withdrawn from the operation of the policy, and any and all stipulation for indemnity concerning it effectually removed. So far as we are informed, blood poisoning is not considered as one of the

primary or idiopathic diseases. It is a toxic condition of the blood caused either from or through a surface wound or some internal lesion, or from the breaking down of tissue incident to an existent or precedent disease, thereby producing suppuration. As to this disease, therefore, these provisos remove every possible condition where the disease can occur, and, if upheld, would, as stated, entirely set aside the definite contract for indemnity contained in a former clause of the policy. Such a result cannot be permitted and is not sustained by authority. It is established doctrine in construing these policies that doubts shall be resolved in favor of the insured. As stated in Vance on Insurance, page 592: "Probably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract, shall be resolved in favor of the insured." And speaking of certain kinds of special insurance, this author further says: "This rule, it is well settled, applies in full force to those contracts of special insurance which, unfortunately for both insurers and insured, are often filled with numerous conditions, the legal significance and economic purpose of which are alike uncertain." In Kendrick v. Mutual Ben. etc. Ins. Co., 124 N. C. 315, 70 Am. St. Rep. 592, 32 S. E. 728, it is held: [265] "The general rule of construction of insurance policies is that, if reasonably susceptible of two constructions, that one shall be adopted which is most favorable to the insured."

Another principle applicable to the case before us, and equally well established, is that while clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet, a proviso which is utterly repugnant to the body of the contract and irreconcilable with it will be rejected; likewise, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside: Hawkins v. Goldsboro Lumber Co., 139 N. C. 160, 51 S. E. 852; Bishop on Contracts, secs. 386, 387; Devlin on Deeds, sec. 838; Beach on Modern Law of Contracts, sec. 718.

Our conclusion is that, as to blood poisoning, the various restrictive provisos are entirely repugnant to the definite stipulation of indemnity contained in the main body of the contract, and are contrary to the general intent and purpose of the policy, and cannot avail to defeat the plaintiff's recovery.

Judgment affirmed.

Insurance Policies are construed liberally with a view to the protection of the insured. If a policy is susceptible of two interpretations, it will be given the one most favorable to the insured: Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa, 555, 97 Am. St. Rep. 330; Royal Circle v. Achterrath, 204 Ill. 549, 98 Am. St. Rep. 224; Champion Ice etc. Co. v. American Bonding etc. Co., 115 Ky. 863, 103 Am. St. Rep. 356; Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 107 Am. St. Rep. 548.

JENKINS v. HOLLEY.

[140 N. C. 379, 53 S. E. 237.]

STATUTE OF FRAUDS—Contract to Assume Debt of Another. The statute of frauds does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor, the promisor thus becoming sole debtor in his place and stead. (p. 847.)

Francis D. Winston and J. S. Matthews, for the plaintiff.

Day, Bell & Dunn and J. B. Martin, for the defendant.

[379] CLARK, C. J. One Wilson, a colored man, was indebted to Jenkins in the sum of twenty dollars for advances, which he agreed to pay or work out. Wilson got employment from defendant Holley and brought him to see Jenkins. The plaintiff testified: "Holley asked if Wilson owed me and how much. I told him I had a paper in which the said Wilson had agreed to pay me in thirty days or do that amount of work. He asked to see the paper and said that Wilson was going to work with him [380] to pay him and he wanted to write one by it. I handed him the paper and he said, 'I will pay you. You need nôt look to Wilson.' I asked him when he would pay me and he said, 'On Saturday next.' I replied, 'Mr. Holley that is all right; I do not look to Wilson for pay, but look to you.' Holley replied to this, 'All right. You look to me; I will pay you.' And Holley took the paper and Wilson went off. I asked Holley for pay several times and he did not pay me and I sued him."

Wilson testified: "I owed Jenkins twenty dollars. He demanded the cash or work. I told him that I would get Holley to pay him, that I was working for Holley. I saw Holley and he agreed to do so, and saw Jenkins and Jenkins agreed to look to Holley for it. I have not paid Jenkins. The promise of Holley was not evidenced by any writing."

Upon the close of this evidence the court nonsuited the plaintiff on the ground that the promise of Holley was not in writing.

The provision of the statute of frauds (now Revisal, section 974), which requires a "special promise to answer the debt, default or miscarriage of another" to be in writing, applies only to invalidate verbal agreements to be surety for the debt, etc., of another for which that other remains liable. It does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor, the promisor thus becoming sole debtor in his place and stead: Haun v. Burrell, 119 N. C. 544, 26 S. E. 111; Whitehurst v. Hyman, 90 N. C. 487. The point was clearly restated last term by Hoke, J., in Sheppard v. Newton, 139 N. C. 533, 52 S. E. 143.

The language here used to plaintiff by Holley, "I do not [381] look to Wilson for pay, but look to you," and Holley's reply, "All right, you look to me; I will pay you on Saturday next," was very strong, if not indeed conclusive, evidence, and is strengthened by Wilson's testimony. The evidence offered by plaintiff should have been left to the jury, with any evidence the defendant might offer, upon the issue whether Holley became sole debtor or was merely responsible if Wilson did not pay.

A promise to assume the debt of another, who is thereupon released, need not be in writing: Mason v. Wilson, 84 N. C. 51, 37 Am. Rep. 612. The arrangement that Wilson was to work for Holley instead of Jenkins was consideration to support the promise. The surrender of the paper is not conclusive evidence of itself, for the defendant contends that this was only for the purpose of making a copy. But upon the whole evidence the case should not have been withdrawn from the jury by a nonsuit.

Error.

An Original Promise to Pay Another's Debt is not within the statute of frauds: See the monographic note to Packer v. Benton, 95 Am. Dec. 255. Consult, also, Joseph v. Smith, 39 Neb. 259, 42 Am. St. Rep. 571. If a person, not before liable, agrees to pay the debt of a third person, and as a part of the arrangement the original debtor is discharged from his indebtedness, the agreement is not within the statute: Dillaby v. Wilcox, 60 Conn. 71, 25 Am. St. Rep. 299. And a promise to pay the debt of another, based upon forbearance to enforce immediately some subsisting lien, is not within the statute, if the release is a damage to the creditor or a benefit to the person promised for: Ellis v. Carroll, 68 S. C. 376, 102 Am. St. Rep. 679.

PATTERSON v. OLD DOMINION STEAMSHIP COMPANY.

[140 N. C. 412, 53 S. E. 224.]

CARRIERS—Discrimination in Selling Tickets.—A common carrier must serve the public without discrimination, and sell tickets and accommodations in the order of application. Therefore, if a purser on a ship declines to furnish a berth to a passenger when he applies therefor, but furnishes one to others subsequently applying, and the passenger thus discriminated against is compelled to sit up all night, the carrier is liable in damages. (pp. 848, 849.)

D. L. Ward and W. D. McIver, for the plaintiff.

No counsel for the defendant.

413 CLARK, C. J. The plaintiff's evidence is that he purchased his ticket and with three friends was first to apply at the purser's office for berths, and requested a stateroom for the four, containing four berths. Two of his friends were given berths in this room, together with two strangers who applied after the plaintiff. The plaintiff and one of his friends were refused a stateroom and berth altogether, and they were compelled to sit up all night. The defendant was applied to by the plaintiff for a berth when he bought his ticket, but the defendant refused to supply staterooms or berths until after the ship had left the dock and was in midstream.

If, as is presumably the case on a steamer running at night, a berth is a reasonable and proper accommodation, the defendant is liable for failure to furnish it, unless the fact that none can be had is made known to the passenger who chooses to ask for a berth when he buys his ticket. The defendant should have had its office for berths open when it sold its tickets. It was its duty to sell tickets to applicants in the order in which they were applied for, without discrimination, till the full number was sold to the passengers whom it could carry comfortably, and the same is true as to the sale of its berths. If its berth and stateroom accommodations are exhausted when a ticket is asked for, the intending passenger on learning that fact may defer his trip till another time, or may go by another route rather than sit up all night. It is an imposition upon the traveling public to withhold information as to the lack of a sufficient number of berths till

after the passage ticket is paid for, and the passenger has embarked and the vessel is in midstream, so that he cannot help himself. Still worse, if possible, is the refusal then to furnish berths in the order in which they are applied for. A common carrier must serve the public without discrimination and sell its tickets and accommodations in the order of application: 6 Cyc. 535. It is liable for an action of damages for a wrongful refusal, and, in addition, for the indignity, [414] vexation and disgrace if there is any evidence of such: Indianapolis etc. R. R. Co. v. Renard, 46 Ind. 293; State v. Delaware etc. R. R., 48 N. J. L. 55, 57 Am. Rep. 543; Wallen v. McHenry, 3 Humph. 245.

Nothing is here said that would militate against the bona fide engagement of tickets and berths beforehand, nor against the refusal to sell a ticket or berth to any person who, for a good reason, may be objectionable to the other passengers, but the passenger, if not thus objectionable, should be informed that no berths can be had—all being already sold—when he purchases his ticket, if he then asks for a berth. And if he does not then apply, when applications for berths are made at the purser's window, in regular course after the vessel starts, the berths not already sold or engaged must be disposed of in the order of application. If this were not so, berths could be furnished to the friends of the purser or for a private consideration to him (a tip), as is here testified was the case, to the exclusion of those prior in time, who did not pay the purser, as well as the regular fare. If the supply of berths is exhausted before an applicant is reached, it will be his own fault that he did not apply for his berth and learn whether or not one could be had at the time he bought his ticket.

The plaintiff here testified that he made no objection to the ladies on board being first supplied with berths, but to other men being furnished who applied for berths after he did, one of whom "tipped" the purser.

The answer sets up defenses which we cannot consider, as no evidence was offered in their support. Upon the evidence offered, the granting a nonsuit was error.

For Authorities bearing upon the decision in the principal case see the note to Pullman Palace Car Co. v. Lowe, 26 Am. St. Rep. 338; State v. Delaware etc. R. R. Co., 48 N. J. L. 55, 57 Am. Rep. 543.

CHERRY v. LAKE DRUMMOND CANAL AND WATER COMPANY.

[140 N. C. 422, 53 S. E. 138.]

REMAINDERMEN.—Where There has been a Trespass on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or the reversion can maintain an action for the wrong done to his estate and interest. (p. 851.)

REMAINDERMEN—Injury to Inheritance—Parties Plaintiff. When a remainder or reversion is held by co-owners, and an action is brought by one of them, the defendant may by demurrer require all persons so interested to be joined; but by filing a general denial he waives any defect of parties, and the plaintiff, upon showing permanent injury to the inheritance, may recover the full amount of damage done to his interest. (p. 852.)

APPEAL—Harmless Error.—If It is Clear that a reversioner's cause of action for a trespass upon the property is barred by the statute of limitations, which is properly pleaded, an error committed by the trial court as to permanent damages is harmless and will not move the appellate court to grant a new trial. (p. 852.)

LIMITATION OF ACTIONS—Trespass by Canal Construction. In North Carolina, an action for permanent damages to real property occasioned by a canal company in widening and deepening its canal and throwing earth upon the premises of the plaintiff is barred in three years; the five-year statute of that state applies only to railroad companies. (p. 853.)

Aydlett & Ehringhaus, for the plaintiff.

Pruden & Prûden and Shepherd & Shepherd, for the defendant.

423 HOKE, J. Plaintiff, owning two-thirds of the reversionary interest in fee, after the life of Mrs. Kate Cherry, in the house and lot abutting on the canal of defendant, brought this action, alleging that defendant, in widening and deepening its canal, in the years 1898 and 1899, had wrongfully and negligently thrown sand and dirt upon and around the said house and lot, causing great and permanent damages to the same. Neither the life tenant, Mrs. Kate Cherry, nor the owner of the other third of the reversion were parties, and the action was brought to recover permanent damage to plaintiff's interest in the property.

Defendant denied that it had wronged or injured plaintiff or his interest and pleaded the statute of limitations in bar of plaintiff's demand.

There was evidence of plaintiff tending to show that in the years 1898 and 1899 the defendant company, a corpora-

tion for constructing and operating a canal in North Carolina and Virginia, had widened and deepened its canal, and in so doing had thrown sand and mud on the plaintiff's premises, and so embanked it upon and around the house situated thereon that when it rained the said house was virtually in a mud hole, and by reason of said wrong and injury the premises had become almost valueless, the house being unrentable and uninhabitable, and the damage thereto was from twelve hundred to fifteen hundred dollars; that the alleged wrong was done by the defendant in 1898 and 1899. There was evidence of the defendant tending to show that the damage was not so great in amount as the plaintiff claimed, and also to the effect that the embankment of sand and mud which caused the injury could be removed.

On the pleadings there were four issues framed for submission to the jury as follows: 1. Is the plaintiff the owner [424] of the land described as alleged? 2. Did the defendant wrongfully and unlawfully injure the plaintiff's land as alleged? 3. If so, what permanent damage to the land has the plaintiff sustained? 4. Is the plaintiff's cause of action barred by the statute of limitations?

At the close of the testimony the court intimated that it would charge the jury that, upon all the evidence, if believed, they should answer the first issue "yes, two undivided thirds subject to the life estate"; the second issue "yes," and the third issue "nothing." The plaintiff excepted and upon this intimation submitted to a nonsuit and appealed.

It has been settled by several decisions of this court that the facts disclosed in the foregoing testimony amount to an actionable wrong on the part of the defendant company toward the owner of the injured property: Mullen v. Lake Drummond Canal etc. Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833; Pinnix v. Canal Co., 132 N. C. 124. And the same authorities declare that when the damage is of a permanent character, recovery may be had in one action for the entire wrong: Mullen v. Lake Drummond Canal etc. Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833. It is also an established principle that where there has been a trespass committed on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or the reversion can maintain an action for the wrong done to his estate and interest. He could not maintain the technical action of trespass, because, as said in Latham v. Roanoke etc.

Lumber Co., 139 N. C. 9, ante, p. 764, 51 S. E. 780, he has neither the possession nor the right thereto; but he could maintain an action of trespass on the case if the wrong was done by a stranger, and of waste or action in the nature of waste if [425] done by the owner of a particular estate: 28 Am. & Eng. Ency. of Law, 2d ed., 575, 622; Burnett v. Thompson, 51 N. C. 210.

Ordinarily, when the remainder or reversion is held by co-owners, the alleged wrongdoer might by demurrer require that all persons so interested should be joined. But in this case, the defendant having entered a general denial, any defect of parties which may have existed is waived; and if permanent damage is shown impairing the value of the inheritance, the plaintiff, as owner of two-thirds of the reversion after the life estate of Mrs. Kate Cherry, has a right of action for the full amount of damage done to his two-thirds interest in the property: Burnett v. Thompson, 51 N. C. 210; Putney v. Lapham, 64 Mass. 232; Thompson v. Hoskins, 11 Mass. 419. The action, then, is well brought so far as the parties in interest are concerned.

The court is also inclined to the opinion that the judge below committed an error in the charge proposed by him on the third issue—that addressed to the question of permanent damage. There seems to have been evidence to be considered by the jury tending to show permanent damage. This intimation of his honor was very likely an inadvertence, and intended by him for the fourth issue—that as to the statute of limitations.

Very certain it is, however, that the judgment of nonsuit should not be disturbed; for though it should be established and declared by a verdict that permanent damage has been done to the plaintiff's estate and interest, it is perfectly clear, both from the allegations of the plaintiff and the uncontroverted facts, that the plaintiff's cause of action is barred by the three year statute of limitations. The statute being properly pleaded, the error as to permanent damage, if any was committed to the plaintiff's prejudice, was harmless and no good would result by awarding a new trial.

In 2 American and English Encyclopedia of Pleading and Practice, 499, we find it stated that [426] "appellate courts deal with judicial acts, and it would not avail to reverse a ruling or judgment correct on the record, though it may be founded on an erroneous reason." And again, in the same

volume, at page 500: "This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal or other objections which the record shows could not have prejudiced the appellant's rights." The decided cases in this and other jurisdictions support this position. In Butts v. Screws, 95 N. C. 215, Ashe, J., for the court, says: "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant": See, also, Ratliff v. Huntly, 27 N. C. 545; Fry v. Mobile Sav. Bank, 75 Ala. 473. The opinion also finds support in the case of Shackleford v. Staton, 117 N. C. 73, 23 S. E. 101, where, on motion, a cause was dismissed when, the statute being properly pleaded, the facts stated in the complaint showed that the cause of action was barred by the statute of limitations.

According to the allegations of the complaint and the uncontroverted facts, the entire wrong was done in the years 1898 and 1899. The action was instituted on August 24, 1903. The statute of limitations which applied (Revisal, sec. 395, subsec. 3) declares that an action of this character is barred in three years. The plaintiff, therefore, can in no event recover, and any error on the third issue was harmless.

It is urged that chapter 224 of the Public Laws of 1895 established a period of five years as the limitation, and that in Mullen v. Lake Drummond Canal etc. Co., 130 N. C. 505, 41 S. E. 1027, 61 L. R. A. 833, the court applied this statute to actions like the present; but this is a misconception of the opinion referred to. This statute (Laws 1895, c. 224), brought forward in the Revisal of 1905 as section 394, which establishes the period of limitation at five years, in express terms applies only to actions against railroad companies, and the courts have no authority to extend [427] its provisions to actions of a different character. The language of the learned judge who wrote the opinion in Mullen v. Lake Drummond Canal etc. Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833, is as follows: "While chapter 224 of the Laws of 1895 applies only to railroads, yet as the court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in Ridley v. Seaboard etc. R. R., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, we see no reason why it should not apply equally to canals." It will thus be observed that the court here only declared that

it would extend the rule of permanent damages to actions against the defendant company according to the principles announced and exploited in Ridley v. Seaboard etc. R. R., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, and as contemplated by the statute in reference to railroads, but did not, and did not intend to, extend the application of the statute or the period of limitation therein established to cases not contained in its provisions. There is no reversible error presented and the judgment of nonsuit is affirmed.

The Rights and Remedies of Remaindermen and reversioners are discussed in the note to Allen v. De Groodt, 14 Am. St. Rep. 628-639. The owner of an inheritance, either by way of reversion or vested remainder, may sue for waste and recover the damages to the inheritance: Latham v. Roanoke R. R. etc. Co., 139 N. C. 9, ante, p. 764. And the fact that the life tenant should have protected the inheritance, and might have sued for an injury done, does not impair the right of action of the reversioners: Learned v. Ogden, 80 Miss. 769, 92 Am. St. Rep. 621.

McAFEE v. GREGG.

[140 N. C. 448, 53 S. E. 304.]

MARRIED WOMEN.—A Judgment by a Justice of the Peace, entitled "McAfee Estate by Cora McAfee, Agent, against W. A. Gregg and wife Addie Gregg," and docketed in the superior court, is not void because of the defect of parties plaintiff, or because it appears in the summons that at the time it was filled out the defendant Addie was then married. (p. 855.)

MARRIED WOMEN.—It is not True that a Justice's Court has no jurisdiction, in any case, of a married woman. She may be sued in that court for a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her after marriage as a free trader. (p. 855.)

Action by McAfee estate, by Cora McAfee, agent, against W. A. Gregg and wife, Addie Gregg. From an order dismissing supplemental proceedings, the plaintiff appealed.

Julius C. Martin, for the plaintiff.

Merrimon & Merrimon, for the defendant.

448 BROWN, J. The supplemental proceedings were instituted to enforce the payment of two judgments rendered by a justice of the peace, entitled as above, and docketed upon

the judgment docket of the superior court of Buncombe county.

1. The judgments are not void because of the alleged defect as to parties plaintiff. Such objection, if taken properly at the time of the trial before the justice, would have been [449] good. The apparent irregularity in the title does not avoid the judgments rendered: Leak v. Covington, 99 N. C. 559, 6 S. E. 241; Hicks v. Beam, 112 N. C. 642, 34 Am. St. Rep. 521, 17 S. E. 490. Cora McAfee is plaintiff of record. The other words may be rejected as surplusage.

2. The judgments are not void because it appears in the summons that at the time they were filled out the defendant Addie was then married. It is not true that the justice's court has no jurisdiction in any case of a married woman. She may be sued in that court for a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her after marriage as a free trader: Neville v. Pope, 95 N. C. 346. If the feme defendant desired to interpose her coverture as a bar to the prosecution of the suits, she should have entered her pleas: Vick v. Pope, 81 N. C. 22. It does not appear upon the records of the justice's proceedings but that the causes of action were such that a feme covert could properly have been sued on them in that court. On the contrary, for aught that appears, the debts may have been contracted by the feme defendant before marriage or as a free trader after marriage. There is nothing appearing in the record to the contrary.

To render the judgment of the justice of the peace void, it must appear on the record not only that the defendant is at the time a married woman, but it must also appear on the face of the proceedings in that court that the cause of action as to her is one over which that court has no jurisdiction.

His honor erred in holding the judgments void and in dismissing the proceedings and dissolving the injunction. The cause is remanded to be proceeded with before the clerk or judge according to law.

Reversed.

Judgments Against Married Women are discussed in the monographic note to Caldwell v. Walters, 55 Am. Dec. 599-611.

PINEUS v. ATLANTIC COAST LINE RAILROAD COMPANY.

[140 N. C. 450, 53 S. E. 297.]

CARRIERS—Passengers—Person Approaching Train.—If a person with a mileage ticket stops over at a flag station until the next train, leaving his trunks in the custody of the railroad company in its warehouse situated on its right of way and used for freight purposes, he is, after rechecking his baggage at the warehouse and starting across the platform to take the approaching train, a passenger. (p. 856.)

CARRIERS—Safe Station Premises—Flag Station.—The rule that the duty of a railroad company to keep safe station premises extends to all who rightfully come there in pursuance of the invitation which it holds out to the public, and to all who come there on legitimate business to be transacted with its agent, applies to flag as well as regular stations. (p. 857.)

Thorne, Gilliam & Gilliam, for the plaintiff.

John L. Bridgers, for the defendant.

450 BROWN, J. The testimony most favorable to plaintiff tends to prove that he arrived at Sharpsburg on defendant's railroad with his trunks, which were placed with checks on them in defendant's warehouse by direction of Dawes, defendant's agent, and they remained in custody of defendant while plaintiff was at Sharpsburg, which was from one train 451 to the next southbound train. The warehouse was on defendant's right of way and used by defendant for freight purposes. Defendant's agents testified that passengers' baggage was stored and handled in the warehouse on this platform. Plaintiff's baggage had been previously stored there and he had gotten on and off the train there. Shortly before arrival of next train defendant's agent sent his clerk with plaintiff to this warehouse for the purpose of rechecking the trunks to Elm City. After rechecking the trunks plaintiff started to take the approaching train. It was at night; there was no light on the platform and it was encumbered with cotton. Plaintiff stepped into a hole in the platform and was injured. Plaintiff had a mileage book good on defendant's road.

If these facts are true plaintiff was a passenger when injured. He had a right to seek his baggage and recheck it. It matters not whether Sharpsburg was a regular or a flag station; the defendant owed plaintiff the duty to provide a safe platform, especially as plaintiff entered on it at invita-

tion of defendant's agent for a legitimate purpose: Daniel v. Petersburg R. R. Co., 117 N. C. 592, 23 S. E. 327. The duty of a railroad company in respect to keeping safe station premises extends to all who rightfully come upon the premises in pursuance of the invitation which it holds out to the public, and embraces all who come there on legitimate business to be transacted with its agent: Wood on Railways, pp. 310, 1341, 1349; Beard v. Connecticut etc. R. R., 48 Vt. 101, 6 Cyc. 605, 610. There was, in our opinion, sufficient evidence of negligence to be submitted to the jury under appropriate issues.

It is contended that there is a variance between the allegations of the complaint and the proof. We do not think the alleged variance sufficient to justify a nonsuit. It may be well to amend the complaint, although we do not decide that it is insufficient as it is. The nonsuit is set aside.

New trial.

Who are Passengers is discussed in general in the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 75-104; and this question is further discussed with special reference to street railways in the monographic note to Duchemin v. Boston etc. Ry. Co., 104 Am. St. Rep. 584-589.

It is the Duty of a Railway Company to keep its station premises in a comfortable, safe and proper condition: See Klugherz v. Chicago etc. Ry. Co., 90 Minn. 17, 101 Am. St. Rep. 384, and cases cited in the cross-reference note thereto.

FISHER v. NEW BERN.

[140 N. C. 506, 53 S. E. 342.]

MUNICIPAL CORPORATIONS—Liability for Negligence.—In so far as municipal corporations are engaged in the discharge of powers and duties imposed upon them by the legislature as governmental agencies of the state, they are not liable for a breach of duty by their officers, for in that respect the officers are the agents of the state although selected by the municipality; but when municipalities are acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable for the negligence of their servants, agents, or officers, whether the latter are individuals or corporations. (p. 861.)

MUNICIPAL CORPORATIONS—Negligence in Operating Light Plant.—Where a city, through a commission established for that purpose, operates an electric light plant to furnish lights for its streets and also for private consumers, it is responsible for the

negligence of the commission in managing the plant, which results in the death of person coming in contact with a live wire. (p. 862.)

ELECTRICITY—Negligence in Managing.—Where a live electric wire has broken and fallen to the ground, it is evidence of negligence to wind it up in a coil and hang it up on an electric light pole some five or six feet above the ground, in a portion of the city frequented by many persons, and there leave it for two days. (p. 863.)

ELECTRICITY—Care Required in Managing.—Persons controlling so dangerous and subtle an agency as electricity must not be permitted to theorize in regard to its probable effects, or speculate upon the chances of results affecting human life; their wires must either be insulated or placed beyond the danger line of contact with people using the public streets. (p. 863.)

W. W. Clark, for the plaintiff.

W. D. McIver, for the defendant.

507 CONNOR, J. This was a civil action for damages alleged to have been sustained by the plaintiff by reason of the death of his intestate, caused by the negligence of the defendant. The testimony, which upon demurrer must be taken as true, showed that the defendant is a municipal corporation, having the usual powers and duties conferred and imposed upon cities and towns in this state. Section 54, chapter 82 of the Private Laws of 1899, entitled "An Act to Incorporate the City of New Bern," provides "that the board of aldermen are authorized and empowered to construct or buy, maintain and operate an electric plant for the purpose of furnishing light to the inhabitants of said city, waterworks system and sewerage system, and the said board of aldermen are authorized and empowered to charge reasonable prices for the use of said light, water and sewerage, when furnished to private consumers." Section 55 empowers the city to issue bonds when the proposition to do so has been approved by the qualified voters, for the purpose of buying or erecting a system of light and water, etc. Pursuant to the power vested in the board of aldermen by this act, they purchased a water and sewerage plant and erected an electric light plant. The charter was amended by chapter 41 of the Private Laws of 1903, and the sections of this statute pertinent to the questions presented by this appeal provide that, for the proper management of the water, sewer and electric light systems, a commission is established. The members of the commission are named in the act and their terms prescribed. At the expiration of such terms their successors are to be elected in the manner provided for the election of the mayor of the

city. The commission is given entire supervision and control of the maintenance, management, etc., of said systems, with power to fix [508] rates for light, water and sewerage, subject to an appeal to the board of aldermen. Provision is made for paying the expenses of maintaining and operating the systems, and payment of interest on the bonds from rates, etc., and the surplus is directed to be held for a sinking fund to discharge the principal of the bonds when due. The commission is required to make quarterly reports to the mayor and board of aldermen of receipts and disbursements, and is given power to employ servants and agents to operate the systems, and to discharge them, etc.

The commission appointed by the act of 1903 were in control of the electric light plant when the plaintiff's intestate received the injury from which he died. The plaintiff's evidence showed that on the night of March 22, 1904, the electric wire on Queen street was down at Five Points, at the police roundhouse. The wire was broken by an engine. The chief of police, who saw the wire down, telephoned for the electrician employed by the commission, whose duty it was to put up wires and attend to the line. When the electrician came to the place at which the wire was down, he said that the wire was not dangerous; that it could wait until morning. He wound up the wire in a coil and tied it with one end of the wire so that it would not come undone. He hung it up on the electric light pole, at the corner of Rountree street, as high as he could reach, about five and a half or six feet from the ground. It did not seem to be a live wire. It was the wire to a lamp. The chief of police also telephoned to the mayor about the wire, who directed him to see the railroad agent about it—said he had nothing to do with it. Large numbers of people generally congregate at the place where the wire was down. When the chief of police found the wire in the street the current was on it. The electrician said that it was not a live wire and there was no danger in it. It supplied a 16-candle power light. The same wire which was run in all houses. Two nights after the wire [509] was broken, the deceased, walking along the sidewalk, stepped on it and was killed. It was raining. There was some controversy in respect to the appearance of the body of the deceased after death. The defendant interposed a demurrer to the evidence, which was overruled. Verdict for plaintiff, judgment, and appeal by defendant.

The defendant's principal contention is presented by its exception to the following instruction: "Chapter 41 of the Private Laws of 1903 does not create the water and light commission into a separate corporation. The act makes the commission officers and agents of the city of New Bern, and if the jury find that the commission was negligent, the city would be responsible for such negligence." His honor correctly construed the statute and drew the proper conclusion in regard to the relation established between the commission and the defendant. The act of 1903, read in connection with sections 54 and 55, chapter 82 of the Private Laws of 1899, simply establishes a new and separate agency for the management and control of the water, sewerage and light systems. The vice in the defendant's contention lies in the assumption that the board of aldermen constitute the municipal corporation. It is no more the political entity created by the charter than the legislature is the political entity called the state. Both are mere governmental agencies, established for enabling the people to declare and enforce their sovereign will and purpose. It is entirely immaterial whether the commission is responsible to or under the control of the board of aldermen. Both are responsible to the municipality, which, for the dual purpose of local self-government and performing such other and appropriate powers as are conferred by the charter, is created by the legislature under the [510] provisions of the constitution, article 8, section 4. If the legislature had made the commission a corporation, the result would have been the same. It is competent and not unusual for municipal corporations, for convenience in carrying on their varied functions, to use commissions, made bodies corporate; when done, the corporation is a mere agency employed by the municipality with the power of visitation and control in the same manner as if an individual was employed. Such corporations occupy similar relations to the municipality, as the university, the hospitals and the state prison do to the state. They are governmental agencies. Their liability to be sued depends upon the purpose for which they are created. When they are simply agencies of the state, such as counties, they may not be sued for torts committed by the agents, as held in White v. Commissioners of Chowan, 90 N. C. 437, 47 Am. Rep. 534, and many other cases. If, as in cities and towns, they have both governmental and business corporate powers conferred, their liability to suits for

the torts of their servants and agents depends upon the sphere of activity in which the wrong complained of is committed. In so far as a municipal corporation is engaged in the discharge of powers and duties imposed upon it by the legislature as governmental agencies of the state, they are not liable for breach of duty by their officers; in that respect, the officers are the agents of the state, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable to an action to persons injured by the negligence of their servants, agents and officers; and it is immaterial whether such servant, agent or officer be a corporation or an individual: Moffitt v. Asheville, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695, in which the authorities are cited and reviewed by Mr. Justice Avery; Willis v. City of Newbern, 118 N. C. 137, 24 S. E. 706. "The distinction is between the exercise of its legislative powers, which it [511] holds for public purposes and as a part of the government of the country, and those private franchises which belong to it as a creation of the law. Within the sphere of the former, it enjoys the exemption of the government from responsibilities for its own acts and for the acts of those who are independent corporate officers, deriving their rights and duties from the sovereign power": McIlhenney v. City of Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Ingersoll on Public Corporations, 415; Maximillion v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468; 1 Smith on Municipal Corporations, sec. 807.

While it must be taken that one of the purposes of the defendant in erecting a system of electric lights was the illumination of its streets, it is equally manifest that in addition to such purpose was that of selling power to its citizens for their private residences and stores. Section 54, chapter 82 of the Laws of 1899 expressly confers this power, and the amendment of 1903, chapter 41, in no way limits it.

Without expressing any opinion upon the suggestion that the lighting its streets is a governmental function, if that was the sole purpose for which its plant was erected and was being operated, it would seem clear that as the portion of its charter referring to an electric plant gives it the right to generate and sell power, we must conclude that it was exercising this right. Nelson, C. J., in Bailey v. Mayor, 3 Hill, 531, 38 Am. Dec.

669, discussing the question, says: "As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in my mind and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If [512] granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hac is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." In that case the plaintiff sued for the negligent construction of a dam across the Croton river by the agents of the city. The work was done under the control of commissioners, appointed by the legislature. The same argument was made as in this appeal. The court said in response thereto that the city was under no obligation to accept the charter or amendments, but, having done so, it was bound for the acts of a commission appointed by the legislature. That case has been uniformly followed by the courts of New York and other states. In Chicago v. Selz, 202 Ill. 545, 67 N. E. 386, it is said: "The injury to the plaintiff did not arise from negligence in the use of its hydrant for the purpose of extinguishing fire. The business of selling water to inhabitants and street sprinkling contractors is not an exercise of the police power, and the city is not exempt from liability for negligence in maintaining such a system."

The conclusion is irresistible that the commission was the agent of the city, and that upon the maxim respondeat superior, it must answer for any injury sustained by its negligence.

In respect to the merits of the case, his honor properly instructed the jury that "negligence is the failure to observe, for the protection of the interest of another person, that de-

gree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." It hardly admits of argument that hanging a live wire on a pole, in the manner testified to by all of the witnesses, in the portion of a city frequented by many persons, [513] and permitting it to remain suspended for two days, in the place and under the circumstances testified to, is evidence of negligence. We see no reason to modify the language of Cook, J., in Mitchell v. Raleigh Electric Co., 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801, 55 L. R. A. 398. The duty imposed upon persons and corporations maintaining wires charged with electricity, upon the public streets and highways, to exercise a high degree of care for the protection of persons using such highways, is imperative. The defendant insists that the wire with which the plaintiff's intestate came in contact, causing his death, was charged with a current of only one hundred and ten voltage, and could not produce death. The evidence shows that, notwithstanding the theory of the electrician, it did cause death. He was mistaken either in the voltage or its effect upon a human body. The man either touched it, as contended by the defendant, or stepped on it, as contended by the plaintiff and as found by the jury, and was instantly killed.

Persons controlling so dangerous and subtle an agency as electricity must not be permitted to theorize in regard to its probable effects, or speculate upon the chances of results affecting human life. The wires must be either insulated or placed beyond the danger line of contact with human beings using the public streets in a lawful way. While the testimony regarding the manner in which the contact was brought about is conflicting, the jury have, upon a fair and impartial instruction, accepted the plaintiff's view. The question of contributory negligence was properly submitted. We find no error in the rule laid down in regard to the measure of damages.

The judgment must be affirmed.

The Liability of Municipal Corporations for injuries suffered from electric wires is discussed in the monographic note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 335. Those utilizing the agencies of electricity cannot complain if a degree of care and skill in the construction and maintenance of the necessary appliances and machinery is exacted commensurate with the dangers involved: Barto v. Iowa Tel. Co., 126 Iowa, 241, 106 Am. St. Rep. 347; Gilbert v. Duluth General Elec. Co., 93 Minn. 99, 106 Am. St. Rep. 430.

MAST v. SAPP.

[140 N. C. 533, 53 S. E. 350.]

TRESPASS to Realty—Whether Action Therefor Belongs to Heir or Administrator.—Where a defectively constructed reservoir gives way and crushes a house below, killing the owner therein, a wrong is committed the instant the house is struck, and the wrongdoer immediately becomes liable for all damages to the building which follow without any intervening and independent act. Therefore, if the owner is alive when the wrong, which is indivisible, is initiated, or when the first injury is done, whether she survives the destruction of the building or not, her administrator, and not her heir, is entitled to recover for all the damage. (p. 876.)

Watson, Buxton & Watson and E. A. Griffith, for the plaintiff.

Lindsay Patterson, H. R. Starbuck and F. T. Baldwin, for the defendant.

534 WALKER, J. This action was brought to determine the right, as between the parties, to a fund of eight hundred and sixty-five dollars, now in the hands of the defendant by agreement, as stakeholder. The controversy arose on the following facts: Angeline Peoples was the owner of a house standing on her lot immediately north of and twelve feet from a reservoir belonging to and used as a place for the storage of water by the city of Winston. On the second day of November, 1904, the wall of the reservoir, which was twenty feet higher than the house, by reason of some negligent defect in its construction or its condition, gave way and either fell, or by the weight and force of the water was driven, against the house, crushing it and killing the said Angeline Peoples, who, with her husband, a son by a former marriage and a stepson, lived in it. The city paid the sum of four thousand five hundred dollars to the administrator of Angeline Peoples for negligently killing her, and also paid to him the said sum of eight hundred and sixty-five dollars, the value of the property destroyed, the latter sum to be held subject to the determination by the court of the proper and rightful claimant thereto. The court submitted to the jury the following issue: "Did the intestate of the defendant survive the destruction of the property described in the pleadings?" which the jury answered in the negative.

The defendant's right to the fund was made to turn upon the survival by Angeline Peoples of the destruction of the

property. The testimony, which was that of her neighbors, tended to show that within a very short time after they heard a roaring sound, they went out and discovered that the reservoir had burst, the water had spread over the ground and had rushed into some of the houses. The house of Angeline Peoples had then been crushed as if by the first impact of the wall and the water. They rescued Fred Burkhart, [535] son of Angeline Peoples, and Walter Peoples, her stepson, and Mr. Peoples, all in the order mentioned, who were more or less injured. They then searched for Mrs. Peoples and found her under the debris, consisting of timber, brick and mortar, and seated in a chair. She was bleeding at the mouth and nose and apparently dead, "as they discovered no signs of life." The brick found on her seemed to have fallen from the chimney. It was about half an hour after they heard the crash before they found Mrs. Peoples. The house had two rooms, and Mr. and Mrs. Peoples and her son slept in the room at the north end of the house—that is, the one farthest from the reservoir, and at the north end of that room.

At the request of the defendant the court gave the following instructions: "1. When the matter at issue is as to whether a person, shown or admitted to be living just before, or a short time before, the happening of a certain event, continued to live until after the event happened, the presumption is that the person did continue to live until after the happening of the event, and the burden is upon the party who asserts the contrary to show that the death occurred prior to or instantaneously with the happening of the event. 3. If the death of Mrs. Peoples did not occur until after the destruction of the property, though but a moment after, then Mrs. Peoples survived the destruction of the property. 4. The burden is on the plaintiff to show that the death of Mrs. Peoples occurred before or instantaneously with the injury to the real estate, or, in other words, that she did not survive the destruction of the property. 6. If the death of Mrs. Peoples did not occur until after the destruction of the property, though but a moment after, then Mrs. Peoples survived the destruction of the property and the jury will answer the issue 'yes.'" And the court refused to give the following: "2. There is no evidence to show that the death of Mrs. Peoples took place before the injury occurred to the real estate, [536] and therefore the jury must answer the issue 'yes.' 5. There is no evidence to show that the death of Mrs. Peo-

ples took place before or at the moment when the injury to the real estate occurred." The defendant excepted to the refusal to give instructions numbered 2 and 5.

The court then charged the jury as follows: "If the jury should find from the evidence that the falling of the house crushed the life out of Angeline Peoples, then she did not survive the destruction of the house, and they should answer the issue 'no,' but if they should find that she was wounded by the falling of the house and afterward died from her wounds, or that she was caught in the ruins and afterward died from suffocation, then she did survive the destruction of the house and the jury should answer the issue 'yes.'" The defendant excepted. Verdict and judgment for plaintiff. Defendant appealed.

The rule of the common law is that a personal right of action dies with the person, but great changes in this respect have been wrought by legislation and the decisions of the courts, and the maxim has thereby lost much of its validity. As to pure torts, it still retains its ancient force and vigor—that is, as to those torts committed to one's person, feelings or reputation—but it does not now apply to torts committed to the property, personal or real. As to the first kind of property, it was repealed by the act, 4 Edward III, chapter 7, and as to the second, by 3 and 4 William IV, chapter 42. These provisions have been substantially adopted by our legislature and will be found in the several compilations of our statutes: Rev. Stats., [537] c. 46, sec. 37; Rev. Code, c. 46, sec. 43; Code, secs. 1490, 1491, 1497; Broom's Legal Maxims, 8th Am. ed., 904 et seq.; Howcott's Exrs. v. Warren, 29 N. C. 20; Rippey v. Miller, 33 N. C. 247; Butner v. Keelhn, 51 N. C. 60; Schouler on Executors, secs. 279, 373. But for this radical change in the law, neither the plaintiff nor the defendant would be entitled to the fund in controversy. One of them must have it, and which of the two is entitled to the favorable judgment of the court, under the law, is the question before us and is one not entirely free from difficulty. "A right to recover recompense for damages (to land) sustained is a chose in action which, if permitted to survive the person damaged, survives to his executor or administrator. The heir or devisee has no interest in or claim to it, and cannot, therefore, either originally prosecute a suit for it or revive one that has been instituted in the lifetime of the person injured": Dobbs v. Gullidge, 20 N. C. 197. But

this presupposes, of course, that the cause of action accrued in the lifetime of the testator or intestate, or, in other words, that the injury was committed during that time. If it was committed after his death, the right of action would belong to the heir or devisee. We must therefore inquire in such a case when, in contemplation of law, the injury was done. Where there is a breach of an agreement or the invasion of a right, the law infers some damage: Bond v. Hilton, 47 N. C. 148; 1 Sedgwick on Damages, 8th ed., sec. 98. The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages: Hale on Damages, sec. 32; Brown v. Manter, 2 Fost. (22 N. H.) 468. The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. This has been expressly decided by this court: Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Parker v. Norfolk etc. R. R., 119 N. C. 685, 25 S. E. 722. "When an injury is permanent, it is what is spoken [538] of in the books as 'original'—that is, as accruing wholly when the wrongful act was done—and is distinguished from an act which is to be regarded as continuing—that is, an injury that could and should be terminated and is to be compensated for strictly with reference to the past and upon the theory that it would be terminated": Bizer v. Ottumwa H. P. Co., 70 Iowa, 147, 30 N. W. 172. The case is cited with approval, and the language above quoted adopted in Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708. An injury committed is, then, a permanent one, in the sense above explained, when it is done at once by the unlawful act or the negligent omission from which the loss results without any repetition of the act, there being only one act and one damage, though the latter may be composed of several items or consist, for example, in the destruction of several different pieces of property. The wrong produces one continuous train of consequences. The loss is all traceable back to the single origin, and in that case the law awards damages once for all: Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Beach v. Wilmington etc. R. R. Co., 120 N. C. 498, 26 S. E. 703. "The right to recover prospective as well as existing damages in an action depends usually upon the answer to the test question whether the whole injury results from the original tortious act or from the wrongful continuance of the

state of facts produced thereby": Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, citing Town of Troy v. Cheshire R. R. Co., 23 N. H. 83, 55 Am. Dec. 177. In the case of a nuisance or a continuing trespass, from the very nature of the act, the cause of action must be of itself a continuing one; but when there is a single wrongful act, which the law denominates the injury, the continuing damages flowing from the one wrong belong to the party originally injured and are recoverable in one suit; the cause of action and damages are an entirety: Cook v. Redman, 45 Mo. App. 397; Moore v. Love, 48 N. C. 215. When a cause of action once accrues there is a right, as of the time of the accrual, to all the direct and consequential damages which will ever ensue—that is, all damages not resulting from a continuing fault which [539] may be the foundation of a new action or of successive actions, and the law will, in such a case, take into consideration not only damage already suffered, but that which will naturally and probably be produced by the wrongful act, subject, of course, to another rule as to what prospective damages can be recovered in actions of tort: 1 Sutherland on Damages, 3d ed., sec. 120; Beach v. Wilmington etc. R. R., 120 N. C. 498, 26 S. E. 703. It has been held that, where an attorney brought a suit improperly, the cause of action arose at the time the error was committed, and not at the time the damage was actually sustained, nor at the time it developed and became definite: Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821; Smith v. Fox, 6 Hare, 386; Howell v. Young, 5 Barn. & C. (11 Eng. Com. L.) 259. So in Shackleford v. Staton, 117 N. C. 73, 23 S. E. 101, this court held that a cause of action arising against a clerk of the superior court, under the statute, for failure to docket a judgment, was complete when the failure first occurred, but the duty to docket was a continuing one during his term, and suit should have been brought within three years after his term expired, and, not having been brought within that time, it was barred, though the actual damage was not suffered by the plaintiff until after the bar of the statute had become effectual. In Hocutt v. Wilmington etc. R. R., 124 N. C. 214, 32 S. E. 681, it is suggested that the cause of action does not accrue until there has been an injury or an actual invasion of the right of the plaintiff and he is in a position to recover his damages. He must at least have the ability to do so, it is said, or otherwise the principle under-

lying the statute of limitations—and, we may add, the assessment of damages—would be subversive of common right. These cases may all be reconciled, perhaps, by keeping in mind the true legal definition of an "injury" and by properly heeding the difference between those cases in which permanent damages, past and prospective, may be assessed and those in which only damages already accrued are awarded, either to the date of the writ or to the time of the verdict. The [540] court in Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821, draws the line of demarcation between a case where there has been an injury or violation of a legal right and one where there has been consequential damage merely, and in that connection refers to the case of Gillon v. Boddington, 1 Car. & P. 541, 11 Eng. Com. L. 463, which is a very instructive one and bears some resemblance, in its general features, or at least in the principles involved, to Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, and Hocutt v. Wilmington etc. R. R., 124 N. C. 214, 32 S. E. 681. In the Gillon case (1 Car. & P. 54, 11 Eng. Com. L. 463), the plaintiff owned a remainder in fee in a wharf expectant on an estate for life in his father. The defendants, in 1823, dug soil out of their dock near the foundation of the wall of the wharf in such a way that, by the action of the tide, the wall was undermined, and it fell in 1824. The father died in 1823, after the digging of the soil. The court held that the son had a right of action for undermining the wall against the defendants, although they had done no act which contributed to its destruction, since the death of his father, at which time the plaintiff came into possession of the freehold of the wharf. It will be observed that in the Gillon case (1 Car. & P. 541, 11 Eng. Com. L. 463) there was a life estate and a remainder in the property and an injury to the inheritance, but the ground of decision was that the digging near the plaintiff's foundation, which was the primary cause of the subsequent injury, was in itself no violation of a right, and that by possibility the act might have proved harmless, as it would have been had the wall never fallen, and this reason for the decision is the basis of the distinction between that case and Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821, as shown by the court in the latter case. When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause

of action is complete. The recovery in such a case will embrace all damages resulting from the wrongful act. The cause of action and the damage are to be deemed inseparable. This principle, as we have shown, does not apply to a case of a nuisance or trespass, [541] which torts are continuing in their nature, the nuisance of to-day being a substantive cause of action, and not the same with the nuisance of yesterday, and likewise in the case of a continuing trespass: Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821; Eller v. Carolina etc. R. R. Co., 140 N. C. 140, 52 S. E. 305. If the trespass consists in one single act of wrong, and has not in it the element of continuance, the general rule we have stated will apply, for where there is the same reason, there must be the same law. The cases of Moore v. Love, 48 N. C. 215, Shaw v. Etheridge, 40 N. C. 300, and Jones v. Kramer, 133 N. C. 446, 45 S. E. 827, are distinguishable from our case. They belong to a class of their own, and were decided upon the ground that the damage was not of a permanent character, as is illustrated in the case last cited, where the nuisance was abatable. They are manifestly not like a case where the wrongful act is single and the tort-feasor has irrevocably done all that he can do, though the unlawful act has not fully spent its force, but as a self-acting agency, once put in motion, continues to cause damage. The wrong itself is an accomplished fact, which its author cannot recall or stop, though its consequences in the way of damage still go on. The case just put is like that we find in Hughes v. Newsom, 86 N. C. 424, where it was said that the wrong or default of the sheriff, when once committed, was absolute and complete, and gave an immediate right to sue for all damages resulting therefrom.

Applying these general principles to the facts of our case, we conclude that this is an action for "consequential damage." The negligent construction of the reservoir did not become a technical wrong until by its natural operation it culminated in the fall of the wall, and the latter is the gravamen of the action, and the specific wrong which produced the damage, for the recovery of which the suit was brought. So long as the city, by its negligence, did no injury to anyone else, it was not, in a legal sense, guilty of any wrong, the maxim of the law, "So use your own as not to injure others," not having been [542] violated. The defective condition of the reservoir was a menace to adjoining property, against

which the owners might perhaps have had preventive relief in equity, but no legal right of another was at all infringed until by the process of time and the gradual operation of the primary cause the wall was undermined and fell, in consequence of what the city had before that time done or failed to do: Roberts v. Read, 16 East, 215. This is what is called in law the "consequential damage," or, more correctly, the consequential injury resulting from the faulty construction of the reservoir, and that is the causa litis: Hocutt v. Wilmington etc. R. R. Co., 124 N. C. 214, 32 S. E. 681. But just as soon as the wall fell on the lot of Mrs. Peoples and struck her house, the first injury, as said in Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, was sustained and her cause of action immediately arose: Roberts v. Read, 16 East, 215. It was not necessary that all of the damage should have been done at that particular instant of time in order to constitute the wrong, for which she might sue and recover the full damages resulting therefrom. The very moment the wall fell, and surely when it struck the end of the house next to it, there was a wrong committed. It was not then a wrong merely threatened, but one which had begun to be executed. The city was not then legally within its right, but had transcended it and was actually invading the right of another to the peaceful enjoyment of her property, and to the protection of it from injury. Its negligence had ceased to be innocuous. It was a tort-feasor, and at once became liable for all ensuing damage of which the injurious act was the efficient cause. If the injury developed in the lifetime of the deceased, and the damage followed in unbroken sequence as the direct and proximate result of it, so that "the facts constituted a continuous succession of events, so linked together as to make a natural whole" (Milwaukee etc. Ry. Co. v. Kellogg, 94 U. S. 475, 24 L. ed. 259) without any intervening and independent act creating new damage or such as was not directly caused by the original wrong, the party to whom the first injury was [543] done, and consequently the administrator in this case, is entitled to recover all the damage. The injury and the damage are one and indivisible. The distinction between a single act of injury and continuing acts is clearly shown in Spilman v. Roanoke Nav. Co., 74 N. C. 675. If the wrong started in the lifetime of the deceased, we do not see how it can be said to have occurred after her death. It cannot be divided into parts, for

it is an integral whole and so regarded in law. Everything that proceeds from it must have relation to the time of its commencement. In Powers v. City of Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792, it appeared that the city had cut a ditch along the side of the plaintiff's lots and caused his lands to be overflowed, and it was held that the cause of action was complete when the unlawful act was committed, and that all the damages accruing from the original wrong must be included in one action. The idea is that the force of the negligent act is fully spent in producing the damage, without any additional fault of the wrongdoer, as is the case where he continues a nuisance or trespass. The damage is susceptible of immediate estimation, no lapse of time being necessary to develop it. It can be assessed, as is the case of injury from a permanent structure, once for all. The court, in Powers v. City of Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792, recognizes the distinctions taken and the principles laid down by this court in Jones v. Kramer, 133 N. C. 446, 45 S. E. 827, and Moore v. Love, 48 N. C. 215. In our case, when the wall of the reservoir was undermined and fell, the wrong was complete, and there is no similitude to a continuing nuisance or trespass for which successive actions will lie. As said in Fowle v. New Haven etc. Co., 112 Mass. 308, 17 Am. Rep. 106: "As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable because every continuance of a nuisance is a new injury, and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an [544] abatable nuisance": Denver City etc. Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565. The case of Rockland W. Co. v. Tillson, 69 Me. 255, is a very instructive case on this subject. It is there said that a second action cannot be maintained for damages resulting from a single act, as it is complete and ended, and it is the damage only which continues and is recoverable, because it is traced back to the original act; while in the case of a nuisance it is the act which continues and is renewed day by day. In the case at bar there was not, and could not be, any repetition of the original wrong after Mrs. Peoples' death, so as to give her heir a cause of action, within the principle of the case just cited, nor indeed was there in fact any damage

after her death. It had all occurred in her lifetime or at the very instant she died. It follows from what we have said that the issue was improperly framed. The question was not whether Mrs. Peoples survived the destruction of the property, but whether the injury was committed before or after her death, under the principles which we have attempted to lay down for the guidance of the court. In his complaint the plaintiff alleges that the destruction of the building and the death of the intestate occurred at one and the same instant of time. If this be true, no part of the injury, if we may use the expression, could have been inflicted after her death, and the title of the plaintiff's ward did not accrue until his mother died. Before that time he had a mere expectancy. Unless the wrong was done after her death, or, what is the same thing in effect, unless it occurred after the title vested in the plaintiff's ward, the latter surely cannot be entitled to the fund in dispute, as he was not in a legal sense injured by the wrong. The plaintiff, in order to make good his claim, must, therefore, show that his ward had already come to his inheritance when the wrong was committed and at its inception, as it is not divisible. Otherwise, the mother's personal representative is entitled to the fund to be administered according to law—for either the one or the other must have it.

545 If the application of the foregoing principles will result in apparent hardship to the plaintiff's ward, we are reminded by Lord Campbell that "Hard cases must not make bad laws," and "we, as judges, cannot be wiser (or more liberal) than the law." It may be that the plaintiff can yet show a better case, but, if he fails, it cannot be attributed to any defect in the law, the rules of which are necessarily of general, if not universal, application, and not made for particular cases.

There was error in submitting the issue, as it was not sufficient to determine the rights of the parties: Falkner v. Pilcher, 137 N. C. 449, 49 S. E. 945. The case was not tried upon the right theory. Some of the instructions asked by the defendant to be given to the jury might have been correct and germane, if the issue had been properly framed.

New trial.

CLARK, C. J., Dissenting. If, as the complaint alleges, the destruction of the building and the death of the intestate occurred at one and the same instant of time, there was no

moment of time during which the right to recover damages vested in her. Hence, no right to an action therefor could pass to her personal representative. If the same movement of matter and at the same instant swept her and her house out of existence, it swept the title to the realty simultaneously into the heir. The destruction being, therefore, damage to the realty, which at that same instant of time became the property of the heir, the damage accrued to him. If so, the charge of the court was correct when he told the jury that "if they should find from the evidence that the falling of the house crushed the life out of Angeline Peoples, then she did not survive the destruction of the house, and they should answer the issue 'no.' "

When parent and child perish in the same shipwreck, nothing else appearing, the modern decisions all hold (ignoring former presumptions based upon strength, age, etc.) that it [546] not appearing that the title vested for an instant in the child, the property goes to the heir and next of kin of the parent. If the damage to the realty and the death of the mother were simultaneous, by the same reasoning the right to recover damages is not shown to have vested in her for an instant, and the realty at that same instant devolving upon the heir, the injury is done to his realty and the compensation should go to him.

When a Cause of Action has accrued for damages to private property from the construction of a railroad, and a suit has been instituted therefor in the lifetime of the party damaged, the right of action will survive and pass to his personal representative upon his death, and not to his heir or devisee: Penn etc. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273.

ROUSE v. WOOTEN.

[140 N. C. 557, 53 S. E. 430.]

SURETY ON NOTE—Primary Liability.—The liability of a surety on a note is primary, for he is, by the terms of the instrument, absolutely required to pay it. (p. 875.)

SURETY ON NOTE—Right to Notice of Dishonor.—A surety on a note is not entitled to notice of dishonor. (p. 878.)

Action to recover the amount of a note payable to the plaintiff and signed by E. A. Hinson as principal and by the defendant as surety. From a judgment for the plaintiff the defendant appealed.

Loftin & Varser and G. V. Cowper, for the plaintiffs.

Wooten & Wooten and Shepherd & Shepherd, for the defendant.

558 WALKER, J. The defendant's contention is that he was discharged from liability on the note by reason of the fact that he was not given due notice of its dishonor, and he relies upon section 2239 of the Revisal to sustain his position. It appears from the face of the paper that it is a note and not a bill, and that defendant was not either a drawer or indorser, who are alone mentioned in that section. The jury in their verdict find that he was simply a surety. His counsel in their brief refer to section 2213 to show that defendant is not primarily liable on the note, but he is not in any sense an indorser, as he is a party to the note, and that section, therefore, has no bearing on the case. We infer from the course of the argument that some reliance was placed on section 2219, dispensing with presentment for payment where it is sought to charge the person primarily liable on a negotiable instrument, the argument deduced therefrom being that presentment is necessary where the party is secondarily liable, and that defendant's liability is of that character. While we do not think the question is distinctly presented, as there is nothing in the verdict concerning presentment for payment, it is a matter of general importance and we will therefore consider it.

The negotiable instrument law (chapter 54 of the Revisal), which is an admirable compilation of the principles relating to the subject, clearly points out the well-settled distinction between persons primarily liable and those secondarily liable

on commercial paper. "The person primarily liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are secondarily liable": Sec. 2342. A surety comes squarely within the definition of a person whose liability is [559] primary, for he is, by the terms of the instrument, absolutely required to pay the same. In Shaw v. McFarlane, 23 N. C. 216, it is held that if two persons are bound by a bond or judgment for the payment of a sum of money, the one is liable to the creditor in the same manner and to the same extent as the other, though, as between themselves, they may stand as principal and surety. "In respect to the creditor they are joint debtors fixed with the same obligations, and and what discharges one discharges the other and nothing less." A surety's obligation is thus defined in Brandt on Suretyship and Guaranty, third edition, section 2: "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal": Markland M. & M. Co. v. Kimmel, 87 Ind. 560. It is there further said that he is not entitled to presentment or to notice of dishonor, and that he is in the first instance answerable for the debt for which he makes himself responsible, and is directly and equally bound with his principal and must take notice of his default: Neal v. Freeman, 85 N. C. 441. The court, by Ashe, J., in Williams v. Glenn, 92 N. C. 255, 63 Am. Rep. 416, said: "As between the makers of a promissory note and the holder, all are alike liable and all are principals"; citing Robinson v. Lyle, 10 Barb. 512. The court then proceeds to say that, as between themselves, the true relation of the parties as principal and surety may be shown, and their rights depend upon principles other than those stated. The distinction between a primary and secondary liability is well stated and illustrated in Coleman v. Fuller, 105 N. C. 328, 11 S. E. 175, 8 L. R. A. 380, where it is said that a surety is bound with his principal as an original promisor, but the contract of a guarantor is his own separate contract and a warranty that what is promised by the principal shall be done and not merely an engagement jointly with the principal to do the thing. "The surety's promise is to pay [560] a debt, which becomes his own when the principal fails to pay it." To the same effect are the cases of

Woody v. Haworth, 24 Ind. App. 634, 57 N. E. 272, and Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686. So in Bell v. Howerton, 111 N. C. 70, 15 S. E. 891, the court declared the principle to be that "the duty of performing the contract, or seeing that it is performed, is on the surety, and that he cannot require the creditor to assume any part of the burden which he has made his own."

The question we now have before us was directly involved in Kearnes v. Montgomery, 4 W. Va. 29, and the court thus defined the relation of a surety to the creditor: "The contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety, which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor; while the surety undertakes for the payment, and so is responsible at once if the principal debtor makes default": Hall v. Weaver, 13 Saw. 188, 34 Fed. 104. The court, in Hammel v. Beardsley, 31 Minn. 315, draws the distinction sharply in these words: "We have not overlooked the technical distinction between the undertaking of a surety, which is primary, and that of a guarantor properly so-called, which is collateral and secondary. But one who absolutely guarantees payment of the debt is in every respect essentially a surety." Substantially the same expression is used in Bank of Newbury v. Richards, 35 Vt. 284, where it is said: "A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any party lawfully holding the paper": Ballard v. Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 667. As we have shown, a surety is in law generally regarded as a maker of the note, and in Hunt v. Johnson, 96 Ala. 130, 11 South. 387, it is held, in accordance with familiar and elementary principles, that the maker of a promissory note is "the primary debtor" and is not entitled to presentment or demand for payment before suit is brought. His obligation to pay is absolute and in no sense [561] dependent upon a demand after maturity. The doctrine is succinctly stated in McIntosh-Huntington Co. v Reed, 89 Fed. 464, where it is said that a surety undertakes to pay if the debtor does not, while in a collateral undertaking, like a guaranty, the undertaking is to pay if the debtor cannot. In the one case, there is a direct liability for the act to be performed, while in the other

there is a liability for the ability only of another to perform the act. "Suretyship is a direct contract to pay the debt of another. It insures the particular claim": Reigart v. White, 52 Pa. St. 440. Indeed, in Kilton v. Providence Tool Co., 22 R. I. 611, 48 Atl. 1039, Douglass, J., for the court, said that "the words 'primary and direct' contrasted with 'secondary,' when spoken of an obligation, refer to the remedy provided by law for enforcing the same rather than to the character and limits of the obligation itself." Whether this is the meaning of those words as used in our statute, we need not inquire, for if it is, the remedy against the surety being direct and immediate, his liability within the sense given to the word by that court would still be "primary": 2 Parsons on Bills and Notes (1871), p. 118. The text-writers are equally explicit in assigning the undertaking of a surety to the class of primary liabilities. "A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatsoever or any notice of default: 2 Daniel on Negotiable Instruments. 5th ed., sec. 1753; Tiedeman on Commercial Paper, sec. 415." "A surety is liable absolutely as principal upon default": 2 Randolph on Commercial Paper, 2d ed., sec. 849. "A surety undertakes primarily to pay if the debtor does not. A guarantor undertakes secondarily to pay if the debtor cannot": 2 Randolph on Commercial Paper, 2d ed., note 2; Dart v. Sherwood, 7 Wis. 523, 76 Am. Dec. 228; Kramph's Exrs. v. Hatz's Exrs., 52 Pa. St. 525. "It must be remembered (it is said in 2 Parsons on Bills and Notes, ed. 1871, p. 118), that while a surety of a note is generally a maker, a guarantor is never a maker. The surety's promise is to pay a debt, which becomes [562] his own debt when the principal fails to pay it, and the surety may therefore be sued at once as soon as the note is due and dishonored."

We find nothing in the negotiable instrument law to sustain the defense set up, either when that law is considered alone or when it is read in the light of established principles.

No error.

For Authorities bearing upon the decision in the principal case, see the monographic note to Pearsall Mfg. Co. v. Jeffreys, 105 Am. St. Rep. 516-518.

MAYERS v. McRIMMON.

[140 N. C. 640, 53 S. E. 447.]

BILLS AND NOTES—Rubber Stamp Indorsement.—If the name of the drawee is stamped on the back of a draft with a rubber stamp by one having authority to do it and with intent to indorse the instrument, the indorsement is valid, but it does not prove itself. (p. 880.)

BILLS AND NOTES—Proof of Indorsement.—An indorsement does not prove itself, but must be established by proper evidence. (p. 880.)

BILLS AND NOTES—Necessity of Indorsement.—The indorsement of a negotiable instrument is essential to constitute a person a holder in due course. (p. 881.)

No counsel for the plaintiff.

McLean, McLean & McCormick, for the defendants.

640 HOKE, J. The plaintiff declared on two drafts payable to the order of the Continental Jewelry Company, and accepted by the defendants, each in the sum of sixteen dollars, bearing date April 19, 1904, and payable respectively ten and twelve months after date. The defendants admitting the acceptance, answered and alleged that they were obtained by false and fraudulent representation on the part of the Continental Jewelry Company in the sale of jewelry to the defendants, and also by 641 means of false and fraudulent warranty inducing the sale, and that the plaintiff took the notes with notice and knowledge of the defenses existing against the notes. On the trial the plaintiff presented the drafts, and at the time each of these drafts was indorsed with rubber stamp, "Pay to the order of Albert W. Mayers, Continental Jewelry Co., Cleveland, Ohio." The plaintiff also introduced the depositions of the plaintiff and Miles F. Baxter, the general manager of said company, and both testified that the two drafts were discounted to the plaintiff before maturity for value, and without notice of any defense or offset. The defendants, contending that on the facts stated the plaintiff was only the assignee or equitable holder, offered testimony to show false and fraudulent representation on the part of said company, inducing the purchase, damage, etc., and on objection this evidence was excluded by the court and the defendants excepted. The defendants then offered to prove that one of the defendants saw one of the drafts

in the bank at Rowland before action brought and after maturity, and at that time said draft had no indorsement on it. On objection, this evidence was excluded and the defendants excepted. The court charged the jury that if they believed the evidence, the plaintiff was entitled to recover the amount of the drafts with interest after maturity, and the defendants excepted. Verdict and judgment for the plaintiff and the defendants appealed.

In Tyson v. Joyner, 139 N. C. 69, 57 S. E. 803, it is held "That in an action on a note it is error to hold that the mere introduction of the note, with the name of an indorsee written on the back, is evidence of its indorsement by such indorsee so as to vest the legal title in the plaintiff and cut off any defense against the indorsee, as the signatures [642] of the indorsers, whose indorsement is required to vest the legal title, must be proved." The principle applies in any action on a negotiable instrument where an indorsement is required to vest the legal title so as to constitute the plaintiff a "holder in due course" and the indorsement is denied. In the cases suggested, and in the absence of such proof, the plaintiff who presents the note is held to be the equitable owner, and the same is subject to defenses or other equities of the maker against prior holders: Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803.

On the trial below the plaintiff presented the drafts, and each appears to have the name of the drawee stamped on the back with a rubber stamp. Where the name required has been so placed by one having authority to do it and with intent to indorse the instrument the authorities hold that this is a valid indorsement: 4 Am. & Eng. Ency. of Law, 2d ed., 258; Horner v. Missouri Pac. R. Co., 70 Mo. App. 285. The indorsement, however, does not prove itself, but must be established, as in other cases, by proper testimony.

The depositions of both the plaintiff and the general manager of the Continental Jewelry Company were received in the court below, and they both testified that the notes had been discounted to the plaintiff by the company before maturity for value and without notice, but neither stated that the instruments had been indorsed under any such circumstances. In the absence of such proof the plaintiff then, as stated, is only the equitable owner holding the instruments subject to any valid defense open to the maker, and the evidence offered by the defendants tending to es-

tablish such a defense should have been received. There is nothing in our statute on negotiable instruments which contravenes this principle. On the contrary, every part of the statute bearing on the subject declares and sustains it. This statute, enacted in 1899, with a view of introducing some uniformity in this important feature of the law-merchant, is in the main only a compendium of established custom concerning negotiable instruments, as construed and applied in the best considered decisions of the [643] courts. And both before and since its enactment it has been held that to constitute a holder in due course of a negotiable instrument payable to order, it is always required that the same should be indorsed. Other requirements may, under given conditions, be dispensed with, but indorsement of such an instrument is essential. Thus, in the Revisal, section 2198, it is provided that "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires in addition the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made." And section 2208, relied upon by the plaintiff, is to like effect: "Every holder is deemed prima facie a holder in due course," etc. By the very definition established in the act, a "holder" of such an instrument, one payable to order, must be a holder by indorsement. Thus, in section 2340 it is declared: "A holder means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." And "bearer" is defined to be "the person in possession of a bill or note which is payable to bearer."

Even if section 2208 had the effect as contended, and it does not, even if the presumption referred to in this section should obtain, there would be error, for the presumption is rebuttable and would yield to facts established by proper testimony. The defendants offered evidence tending to show that one of the drafts had been seen at the bank in Rowland, North Carolina, unindorsed and after maturity, and this evidence also should have been admitted, for, if this be true, it would in any event destroy the plaintiff's alleged position as holder in due course and subject the note to any legitimate defense available.

There was error in refusing to receive and consider the evidence offered and a new trial is awarded.

On the Effect of a Rubber Stamp or Stencil Signature, see Loughren v. Bonniwell, 125 Iowa, 518, 106 Am. St. Rep. 319; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841.

The Transfer without Indorsement of a negotiable instrument destroys its negotiable character, and the assignee takes it subject to such defenses as might have been available against it in the hands of the payee: Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

REYNOLDS v. GREAT NORTHERN RAILWAY COMPANY.

[40 Wash. 163, 82 Pac. 161.]

NEGLIGENCE.—The Failure to Comply with a Statute making it the duty of a railway carrying cattle to unload them after confinement for the period of twenty-eight consecutive hours for rest, feed and water is negligence per se, rendering the carrier liable for the resulting injuries to the animals. (p. 891.)

NEGLIGENCE, Complaint Showing a Violation of Law a Sufficient Plea of.—Where the complaint shows that the defendant railway corporation violated the law requiring it to unload cattle after confinement of twenty-eight consecutive hours, it need not contain any further averment of the defendant's negligence. (p. 891.)

APPEAL AND ERROR.—An Error in Refusing to Strike Out part of a reply to an answer on the ground that it is sham, frivolous and immaterial is harmless, if the cause is tried by the court without a jury. (p. 891.)

CONTRACTS.—If a Contract Exempts a Carrier from Liability for Failure to Unload Stock after twenty-eight consecutive hours of confinement, the exemption is void. (p. 892.)

CARRIERS OF LIVESTOCK, Failure of to Unload for Resting.—A provision in a contract for the carrying of livestock that the shipper will unload and load the stock at his own expense and risk at any place where the same may be unloaded for any purpose does not relieve the carrier from the duty of unloading after twenty-eight consecutive hours of confinement for resting, food and water, where the carrier does not give the shipper an opportunity to unload his cattle for such purposes. (p. 892.)

CARRIERS OF LIVESTOCK—Manner of Delivery.—It is the duty of a carrier of cattle to deliver them to the consignee in or through inclosed lots or yards convenient to the place of unloading, and if they are scattered by reason of being unloaded in an improper place, the carrier is liable for the damages occasioned thereby. (pp. 892, 893.)

CARRIERS OF LIVESTOCK, Presenting a Claim Against, When in Time.—A condition in a contract for the shipping of livestock that claims for damages must be presented within ten days is

sufficiently complied with when, the next day after being damaged, the shipper talked with an agent of the carrier announcing the desire to put in a claim for damages and that agent's telling him to see another, and the latter, being seen, directing the shipper to see a third agent, who, on being seen, requests the shipper to write him a letter, and this letter is accordingly written, though not within the ten days. (p. 893.)

CARRIERS OF LIVESTOCK, Claim by for Damages, When Sufficient.—A claim against a carrier of livestock making a direct demand for damages then known to have been suffered, and stating that there are still lost thirty-five head for which the shipper had offered two dollars per head, is sufficient to sustain a claim for depreciation in value by reason of the straying off of lost cattle. (p. 894.)

M. J. Gordon and Charles A. Murray, for the appellant.

Merritt & Merritt, for the respondent.

[164] MOUNT, C. J. This action was begun by respondent to recover damages for loss of certain livestock shipped from Heppner, Oregon, to Marian, Montana. The complaint alleges, in substance, that the plaintiff loaded twelve cars with cattle at Heppner Station, in Oregon, to be transported to Marian, Montana; that the cattle were loaded on the cars of the Oregon Railroad and Navigation Company at 8 o'clock A. M. on the eighteenth day of May, 1903, and were transported over the line of the said railway to Spokane, Washington, where they arrived at 11 o'clock A. M., on the same day; that said cattle were thereupon transferred and received by the appellant, and were forwarded by it on its line at 1:30 o'clock A. M. on the nineteenth day of May, 1903, and arrived at the station at Marian, Montana, at 9 o'clock P. M. of the nineteenth day of May; that the said cattle were not being carried in cars where they could have proper food, water, space and opportunity to rest; that they were confined in said cars for a longer period than twenty-eight consecutive hours without unloading for rest, water and food; that appellant was not prevented from unloading said cattle by [165] storms or other accidental causes; and that by reason of the long delay and said cattle being confined in said cars, they became run down and eighteen of them, of the value of four hundred and ninety dollars, died.

The complaint further alleged that, at the time the cattle arrived at Marian, it was a dark night, there were no stockpens or any other appliances necessary or in which said cattle could be confined and kept, and by reason of the darkness

of the night it was impossible for respondent to confine said cattle in any inclosure; that said cattle wandered away and became scattered and lost throughout the country surrounding said town, and that respondent incurred an expense of one hundred and forty-five dollars in collecting them together again; and that a part of said cattle so scattered and lost could not be found for a long time, and they depreciated in value in the sum of one hundred and six dollars. Respondent claimed damages in the sum of seven hundred and forty-one dollars.

Appellant interposed a demurrer to the complaint, which was overruled by the court. Appellant thereupon answered, admitting shipment of the cattle, but alleging that it had no knowledge of the hour when they were shipped from Heppner, and that said cattle arrived at Marian at 8:25 o'clock P. M. on the nineteenth day of May, 1903; and denying the other allegations of the complaint. The answer alleged affirmatively that the cattle were delivered to the Oregon Railroad and Navigation Company under the terms and conditions of a contract in writing, signed and entered into between the respondent and the railroad company, as follows:

"The Oregon Railroad and Navigation Company. (Original) Limited Liability Livestock Contract No. 34. (Read this Contract.)

"Heppner, Oregon, Station, May 18th, 1903.

"This agreement, made this 18th day of May, 1903, by and between the Oregon Railroad & Navigation Company, hereinafter called the carrier, and J. E. Reynolds, of Heppner, hereinafter called the shipper.

166 "Witnesseth: That the said shipper has delivered to the said carrier 12 cars of cattle consigned to J. E. Reynolds, at Marian, Montana, destination, via Spokane, to be transported upon the conditions hereinafter set forth, over the line of the Oregon Railroad & Navigation Company, to Spokane, and there delivered to the consignee, owner or order; or to such company or carrier (if the stock is to be forwarded beyond said station) whose line may be considered a part of the route to destination, it being understood that in and about the delivery of said stock to such connecting carrier the Oregon Railroad & Navigation Company acts only as agent for the consignee or owner, and that the liability of each carrier hereunder shall cease and terminate

upon delivery of said stock to the next connecting carrier, the consignee or owner.

"It is expressly agreed that this contract and the responsibility of all the carriers over whose lines the shipment may pass is limited and controlled by the conditions herein contained, which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. It is further agreed and understood that the person delivering to this company the shipment or any part thereof described herein is authorized to sign this contract for and on behalf of the shipper, with full power in the premises.

"NOTICE. Blooded animals, or animals deemed especially valuable, will be carried only on special contract, and railroad agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignor and the railroad company or its duly authorized agent.

"Men only, in charge of stock, may accompany the same upon the rules and regulations set forth in circulars issued by the railroad company, and upon executing the release of liability printed on the back hereof.

"Agents of the railroad company are expressly forbidden to contract for delivery of livestock at any specified time, or for any particular market; and no agent of any carrier may under any circumstances alter, change or modify or agree to alter, change or modify any of the terms of this contract. Special contracts can only be made by the general freight agent, with whom the agent, upon request of the shipper, will communicate by wire. This document must 107 be presented without alteration or erasure. Said shipper for himself, the consignee or owner, agrees to pay or guarantee the freight thereon at the rate of $—— tariff per standard car of 29 to 30½ feet in length (subject to established per cent decrease or increase applicable to cars of less or greater length), or $—— per hundred pounds (subject to established minima for cars of varying lengths) as shown by limited liability tariffs governing, which rate is less than the regular tariff rate for the transportation of livestock at carrier's risk, and is given said shipper at his special request, in part consideration of his agreement to the limitation of the liability of the railroad company as a common carrier upon the terms and conditions herein set forth, which are accepted and agreed to by the shipper as

just and reasonable; it being understood that each and every condition of this agreement shall inure to the benefit of each and every carrier over whose line said stock may pass under this contract.

"In consideration of the special reduced rate herein provided for the transportation of the livestock above described, it is hereby stipulated and agreed as follows:

"(1) The carriers shall not be liable for the loss or death of or for any injuries received by any of said stock unless the same is the direct result of willful misconduct or actual negligence of said carriers, their agents, servants or employés.

"(2) It is expressly agreed that the value of the livestock to be transported under this contract does not exceed the following mentioned sums, to wit: Horses, mules and jacks, not exceeding $100 per head; oxen, bulls or steers, not exceeding $50 per head; cows, not exceeding $30 per head; hogs or calves, not exceeding $10 per head; sheep or lambs, not exceeding $3 per head; and in no event shall the carrier's liability exceed $1,000 upon any carload, such valuation being those whereon the rate of compensation to said carriers for their services and risk connected with the transportation of said livestock is based.

"(3) The shipper agrees to load and reload all said stock at his own expense and risk, and to feed, water and tend the same at his own expense and risk while it is in any stockyards, whether the same be operated, owned or controlled by said carriers or otherwise, and while on the cars [168] or at feeding points, or any place where the same may be unloaded for any purpose whatever.

"(4) The shipper assumes the exclusive duty of properly and securely fastening said stock in the cars and of removing them therefrom, and of keeping such cars, and any inclosure in which said stock may be confined, securely locked or fastened so as to prevent escape of stock therefrom. The shipper agrees to inspect the cars in which said stock is to be transported, and any yards or inclosures on the premises of the railroad company into which said stock may be unloaded and satisfy himself that they are sufficient and safe and in proper order and condition; and shall report to the agent or employés of said carrier any visible defects therein, and demand necessary repairs, before proceeding to occupy said cars or inclosures, and the fact of his loading said stock

into said cars or occupying said inclosures shall be an acknowledgment and acceptance by him of the sufficiency and suitability in every respect of said cars and inclosures for the shipment and yarding thereof; and he hereby assumes all risk of injury which said livestock or any of them may receive in consequence of any of them being wild, unruly, weak, maiming each other or themselves; by or in any consequence of heat or suffocation, or any other ill effects of being crowded or injured by the burning of straw, hay or other material loaded with or used for feeding the stock or otherwise; and also all risk of damage which may be sustained by reason of delay in transportation, and all risk of escape of any portion of said stock; or loss or damage from any other cause or thing not resulting from the willful negligence of the carriers, their officers, agents or employés.

"(5) If the carriers, or any of them, shall furnish any laborers to assist in loading or unloading said stock at any point, no additional charge being made therefor, such laborer or laborers shall while so engaged be deemed exclusively employés of the shipper, and no carrier shall in any event be liable for any act or thing done or omitted to be done by such laborer or laborers in connection with said stock while so engaged.

"(6) If the car or cars wherein said stock is to be transported shall be furnished by the shipper and tendered to the carrier for that purpose, said shipper assumes all [169] risk for, in and about said car or cars, and no liability or responsibility shall attach to any carrier or carriers under this contract arising from or growing out of any insufficiency or defect in the condition of any such car or cars.

"(7) No carrier shall be liable for any loss or damage to said stock by causes beyond its control, by floods, fire, quarantine, disease, riots, strikes, or stoppage of labor, shrinkage in weight, changes in weather, heat, cold, or any other cause not directly the result of gross negligence on the part of said carriers, their agents and servants.

"(8) The shipper expressly agrees to load, unload and care for said stock while upon the cars or premises of the carriers in a careful and humane manner, in strict compliance with the laws of the United States and of each and every state through which said stock may be transported.

"(9) Unless claims for loss, damage or detention are presented within ten days from the date of the unloading

of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock shall have the benefit of any insurance that may have been effected thereupon.

"(10) The rules, regulations and conditions prescribed by the carriers for the transportation of livestock as evidenced by their published tariffs, classifications and circulars in force and effect, are binding upon the shipper. The signing of this contract by the shipper or his agent shall be conclusive evidence of knowledge, assent and agreement to each and every stipulation and condition thereof by said shipper.

"Witness my hand:

"J. E. REYNOLDS,
"Shipper.

"THE OREGON RAILROAD & NAVIGATION COMPANY,
"By J. M. KERNAN,
"Station Agent."

The answer further alleged that said shipment was received by appellant from the Oregon Railroad and Navigation Company at Spokane, on the nineteenth day of May, 1903, and was transported from Spokane to Marian with all possible dispatch without any misconduct or negligence on the part of defendant, its agents, servants or employés, and [170] that said cattle were, at said station of Marian, delivered to the respondent on the nineteenth day of May, 1903, at 8 o'clock P. M., mountain time, and were there and then received by him, and no claim for loss or damage or detention was presented by the plaintiff within ten days from said nineteenth day of May, 1903, nor before said stock was mingled with other stock; and alleged that any claim for loss or damage to, or detention of, said stock had been waived by the respondent, and was barred by the terms and conditions of said contract.

To this answer the respondent replied, alleging, among other things, that he had no knowledge or information sufficient to enable him to form a belief as to whether or not said cattle were received for shipment and transportation by said railroad company under and according to the terms and provisions of the contract set out in the second para-

graph of said affirmative defense, and therefore denies all that portion of said paragraph relating to said contract; and alleging the fact to be that whatever contract was signed by said respondent was signed for the purpose of getting said cattle transported, and without any knowledge or information on the part of the respondent as to the contents of the said contract, or any of the provisions therein contained. Respondent also, by a further and affirmative reply, alleged that when he signed the contract he did so without knowledge of its contents or conditions; that if he signed said contract at Heppner, the cattle were not received by appellant and transported upon the conditions of said contract, but that at Spokane a new contract was made with appellant, the contents of which were unknown to respondent; that if respondent made said contract with the Oregon Railroad and Navigation Company, containing provisions that he should present any claim for loss within ten days, said condition was unreasonable and unenforceable and was contained in the contract without his knowledge; that if said contract contained any condition or provision that he should [171] assume all risk of damage by delay, such a condition was unreasonable and unenforceable; that in the transportation of said cattle, they were delayed for a period of more than twenty-eight consecutive hours without unloading for rest, water and feeding, and that appellant was not prevented from unloading said cattle by storms or other accidental causes, and that said cattle did not have proper room and space for feeding and rest in the cars, contrary to the laws of the United States of America; that a great deal of time was consumed between Spokane and Marian by the cars in which the cattle were contained being detained upon sidetracks; that after said cattle were unloaded at Marian said respondent was delayed for a period of ten days in gathering the cattle together, because they were unloaded upon the open prairie; that as soon as it was possible for respondent after the said cattle were found, he presented himself to the agent of the railroad company at Marian and was by said agent directed to present the matter to the agent of the company at the city of Spokane, whereupon he proceeded to the city of Spokane and informed the agent Jackson of his losses, and that they were to the extent of one thousand dollars; that said agent Jackson advised him to proceed to his home and write a letter as to the amount

of his losses; that thereafter, on the second day of June, 1903, in pursuance of said instructions from said agent Jackson, respondent did write a letter, in which he informed said Jackson that his losses and damages were one thousand dollars; that the actual loss on account of cattle that had died was four hundred and ninety dollars; that, subsequent to the time of writing said letter, he found nearly all of the cattle; and that, at the time when found, they had depreciated in value.

Appellant filed a motion to strike out certain portions of the reply of the respondent on the ground that the matter contained therein was sham, frivolous and irrelevant. This motion was denied. Thereupon the case was set for trial, and by consent of the parties was tried to the court [172] without a jury. At the conclusion of the trial the court made findings in favor of the respondent, and entered a judgment in his favor for the full amount prayed for in the complaint.

It is unnecessary to set out the findings in this opinion. Appellant first contends that the complaint is not sufficient, because it is not alleged that twenty-eight hours is an unreasonable time to confine cattle in transit without unloading said cattle for rest, water and food; and that it is not shown that there was any unnecessary delay, or that there was any reason stated why appellant should have unloaded the cattle for rest, water and food, or that appellant was negligent in any manner. The federal statute, found at section 4386 of the United States Revised Statutes, makes it the duty of railways carrying cattle from one state to another to unload such cattle, after confinement for a period of twenty-eight consecutive hours, for rest, food and water, unless prevented from so unloading by a storm or other accidental causes.

"And although a penalty is imposed for a violation of this regulation, nevertheless a failure to comply therewith is negligence per se, rendering the railroad company liable to the shipper for resulting injuries to the animals": 6 Cyc. 439, and authorities there cited.

Under this rule it was only necessary for the complaint to show a violation of the duty imposed by law and the resulting injury to the plaintiff. These facts were shown, and the complaint therefore states a cause of action.

Appellant argues at length in its brief that the court erred in refusing to strike out certain parts of respondent's reply

to appellant's answer because such parts were sham, frivolous and immaterial. Such errors, if made by the lower court, are harmless here, for the reason that the cause was tried to the court without a jury, and the whole cause is therefore reviewable here de novo. In such cases this court disregards matters of evidence or pleadings which are immaterial. The argument of appellant upon the motion to [173] strike parts of the reply is based upon the ground that the contract of shipment heretofore set out in full is a valid and binding contract.

Respondent claims that the contract is void because it is unfair, unreasonable and not consistent with public policy. Conceding for the purpose of this case, without deciding, that the contract in question is a valid and binding contract, we still think the plaintiff is entitled to recover. There is no provision in the contract exempting the appellant from loss by reason of a violation of the duty to unload said cattle for rest, food and water, as required by law. If there were such provision, it would certainly be void. There is a provision to the effect that the respondent should load and unload said stock at his own expense and risk at any place where the same may be unloaded for any purpose whatever. But this provision cannot be held to relieve the appellant for a breach of duty to unload for rest, food and water, as required by law, and it is not claimed that an opportunity was given to the respondent to unload for these purposes which he neglected or refused to avail himself of.

It was also the duty of the carrier to deliver the cattle to the consignee in or through inclosed lots or yards convenient to the place of unloading: Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. Rep. 461, 35 L. ed. 73. While the contract provided that the respondent should unload the cattle at his own risk, it did not provide for such unloading at a place where there were no facilities therefor. The evidence shows that respondent did not know that there were no yards or pens or other facilities at the place of destination for unloading the said cattle, and he was not informed thereof. His contract, therefore, must be construed as made with reference to unloading where there were the usual and proper facilities for such work. There were no facilities for unloading at the place of destination, and none were furnished. By reason thereof respondent's [174] cattle were scattered, and he was put to extra expense to gather

them again. We think there is no provision in the contract which reasonably construed would waive loss on this account.

Appellant also contends that respondent waived any claim for damages by failure to present a claim therefor within ten days from the date of unloading said stock, as provided in the contract. The evidence shows that no written claim was presented until June 2, 1903. The stock was unloaded on May 19, 1903. The contract does not require the claim to be made in writing, or in any specified form. The evidence shows that on the next day after the stock was unloaded respondent talked with the agent at Marian and told him that he wanted to put in a claim for loss, without mentioning any definite amount; that the agent told respondent to see the agent at Kalispell when he paid the freight; that respondent went to the agent at Kalispell to pay the freight, and talked with him about the claim for damages, and the agent there directed respondent to see Mr. Jackson at Spokane; that two or three days prior to June 2, 1903, respondent saw Mr. Jackson, who requested him to write a letter, and that he, Jackson, would thereupon attend to the matter right away. Thereupon, on June 2, 1903, respondent wrote the following letter:

"Arlington, Ore., June 2nd, 1903.

"Mr. H. A. Jackson.

"Dear sir: I shipped a train of cattle from Heppner, Oregon, to Marian, Mont., on the 18th day of May; I left Heppner at 8 o'clock and 30 minutes in the morning, reached Spokane ten minutes to twelve in the night, and I was till after nine the next night getting to Marian, and had a loss of 18 head of cattle, 14 cows, 2 calves and two yearling steers, which were worth $490, and I make claim for that amount. The train should have reached Marian before noon on the 19th, and I would have been $1,000 better off if it had, for the cattle scattered on me trying to get them to pasture in the night, and it took several days of time and expense to get what I got, and [175] there is still 35 head lost that I have offered $2 per head for. I think you can see my situation. Should you want any further proof of what I say, your people at Marian and also W. F. Hubbart, of Hubbart Cattle Co., Kalispell. Your services were good, only I was kept sidetracked almost half of the time I was on your line with the train. Whose fault it was I don't know. There is a chance to do a lot of business in that section, and if this claim is

settled and I get the service in future that I have reason to believe you can give, there is nothing in the way of doing a good deal of business in the future. Hoping to hear from you in the future, I am,

"Yours very truly,

"J. E. REYNOLDS."

This claim for damages was within time under the contract. On the next day after the cattle were unloaded respondent notified appellant's agent that he desired to make a claim for damages. Appellant's agents cannot be permitted to put respondent off from one time to another and finally be heard to say that no claim was made in time; especially when respondent was asking to make a claim within the time limited. It is true the claim which was sent to the agent of the company in writing made direct demand for only four hundred and ninety dollars, the damage then actually known. But it is also stated that there were still thirty-five head lost which respondent had offered two dollars per head for. We are of the opinion that this was sufficient to support the finding of damages for the item of gathering and depreciation in value of lost cattle.

Finding no error in the record, the judgment appealed from is affirmed.

Dunbar, Root, Hadley, Fullerton, and Rudkin, JJ., concur.

The Duty of Common Carriers to water livestock in course of transportation is discussed in the monographic note to Heller v. Chicago etc. Ry. Co., 63 Am. St. Rep. 554-558. Under section 4386 of the United States Revised Statutes, it is negligence per se for a railroad company to keep livestock upon its cars for more than twenty-eight consecutive hours without unloading them for rest, water and feeding; and the company is liable not only for the penalty imposed by the statute, but also for all damages or injuries that may thereby be sustained by the owner of the animals: Nashville etc. Ry. Co. v. Heggie, 86 Ga. 210, 22 Am. St. Rep. 453.

The Right of a Carrier to Limit His Liability by contract with the shipper is discussed in the monographic note to Chicago etc. Ry. Co. v. Calumet Stock Farm, 88 Am. St. Rep. 74-134. This question is discussed with special reference to carriers of livestock in the recent cases of Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170; Nashville etc. Ry. Co. v. Stone, 112 Tenn. 348, 105 Am. St. Rep. 955.

IN RE SULLIVAN'S ESTATE.

[40 Wash. 202, 82 Pac. 297.]

COLLATERAL ATTACK upon Judicial Proceedings.—When judicial proceedings are collaterally attacked, all intendments are in favor of their regularity. This rule applies in favor of an order vacating a previous order. (pp. 897, 898.)

APPEAL AND ERROR, Final Order, What is.—An order vacating a previous dismissal and dismissing a will contest is a final order and is the order from which the appeal must be taken. (pp. 898, 899.)

WILLS—Contest of, Amendment of After the Lapse of a Year.—If a contest of a will is filed within a year and is struck out for want of proper verification, but with leave to amend, and the petition is amended accordingly and filed, but not until after the lapse of a year from the date of the order admitting the will to probate, the court does not lose jurisdiction to proceed with the contest. (p. 900.)

WILLS, Contesting After a Year Where Decree Admitting to Probate was Void.—If a decree admitting a will to probate is void, a contest of the will may be filed more than a year after the entry of such decree. (p. 900.)

WILLS, Contest of, Delay in Caused by Injunction Procured by the Contestant.—A will contest should not be dismissed for delay in prosecution, though such delay was due to the restraining order of another judicial tribunal, procured at the instance of the contestant. (pp. 900, 901.)

WILLS.—A Decree Probating a Will is Void when the citation was returnable on the day it was issued and was not served on the widow or next of kin of the decedent. (p. 902.)

WILLS.—The Burden of Proving an Alleged Will is on the proponents, though a void decree has been entered admitting it to probate. (p. 903.)

WILLS, NUNCUPATIVE, Right to Probate of, When not Lost Because of Delay and of a Void Order.—If an alleged nuncupative will is offered for probate and the testamentary words proved and reduced to writing within six months, and a void order entered purporting to admit the will to probate, the proponent does not lose the right after the lapse of six months of proceeding with the probate of the will and the trial of the contest thereof. (p. 903.)

APPEAL AND ERROR.—Matters not Presented to the Trial Court will not be considered on appeal for the purpose of advising such trial court of the action it ought to take on their being subsequently presented to it for consideration. (p. 903.)

Piles, Donworth, Howe & Farrell and Shank & Smith, for the appellants.

J. P. Houser and J. W. Robinson, for the respondent.

207 HADLEY, J. This is an appeal from an order dismissing a petition interposed for the purpose of contesting the probate of an alleged nuncupative will. John Sullivan

died in the year 1900, leaving a large estate, consisting of real and personal property. In November, 1900, Terence O'Brien was appointed general administrator of said estate, and he is still acting as such. On the eighth day of March, 1901, Marie Carrau filed in the superior court of King county, where the administration proceedings are pending, a petition for the probate of an alleged nuncupative will, which she avers was made by the said deceased, and under which she claims to be the sole beneficiary. The record shows that, on the same day the petition was filed, a so-called citation was issued, directed to the widow and next of kin of said deceased, citing them to appear before said court at the hour of 10 o'clock A. M., on the said day, and reciting that at said time the said petition would be heard. The citation was filed on the same day, and attached thereto was the return of the sheriff that, after diligent search, he was unable to find the widow or next of kin of said deceased in King county. Thereupon, on the same day, the court heard testimony and entered an order admitting said alleged will to probate.

On June 20, 1901, Hannah O'Callaghan and Edward Corcoran filed their petition contesting the said nuncupative [208] will and the said order of probate. They alleged that Sullivan died intestate, leaving no widow or children, father or mother, brothers or sisters, and no heir or next of kin other than the petitioners, who are alleged to be the first cousins, and the only first cousins, of the deceased; that said Marie Carrau and two of her sisters and a brother in law had conspired together to manufacture a pretended will; and that these persons had procured said order of probate without notice to anyone, and without any lawful citation having been issued. They asked that said order of admission to probate be set aside. Marie Carrau answered said petition in November, 1901.

On the third day of March, 1902, said O'Callaghan and Corcoran filed a second petition in said contest, and on April 16th of said year Marie Carrau moved to strike said last-named petition, on the ground that it was neither signed nor verified by the petitioners, nor by anyone authorized in law to verify it. The court granted this motion, and expressly granted the petitioners leave to amend. The petitioners then filed an amended petition containing a verification by counsel, which stated that the petitioners were nonresidents, and that

they were not in King county. The last-named petition was filed April 19, 1902. Marie Carrau moved to strike this petition on the alleged ground that the petitioners had not appeared to contest said will within one year from the probate thereof, and afterward, in March, 1904, before said motion was ruled upon, she further moved that the petition be dismissed for want of prosecution. On the sixth day of January, 1905, the court entered an order granting said motions and dismissing the petition. On the following day, January 7th, the court entered the following order: "It is by the court ordered that, as the order of the undersigned made on January 6, 1905, dismissing the amended petition of contest of the above named petitioners filed April 19, 1902, was made in the absence [209] of counsel for petitioners, the said order is set aside, and now on this seventh day of January, 1905, the said amended petition is hereby dismissed. W. R. B. This order is made for the purpose of having the order of Jan. 6, 1905, entered and effective as of this date."

At the time of the entry of the last-named order, Edward Corcoran and Charles H. Farrell, as administrator of the estate of Hannah O'Callaghan, deceased, gave oral notice in open court that they appealed from so much of said order as dismissed the said petition. It is that appeal which is now before us.

Terence O'Brien, as the administrator of the Sullivan estate, is made a party respondent to this appeal, but Marie Carrau is the only respondent who has appeared by counsel in this court. Said respondent has moved to dismiss the appeal, on the alleged ground that the record discloses facts which deprive this court of jurisdiction. Respondent's contention in this particular is based upon the following facts: As above stated, the court, on January 6, 1905, entered an order dismissing appellants' petition. On January 7th that order was vacated, and another order of dismissal was entered, a copy of which is hereinbefore set out. The oral notice of appeal relates to that part of the last order which dismissed the petition. Respondent contends that the real judgment of dismissal was that entered January 6th, and that no appeal has been taken from that judgment. Respondent has not appealed from the order of January 7th, and her motion to dismiss the appeal is therefore a collateral attack upon so much of that order as vacated the order of January 6th. When proceedings are collaterally attacked, all in-

tendments are in favor of their regularity, and inasmuch as the court found that the first order should be vacated and set aside, we must presume that its finding was based upon sufficient cause, unless the contrary clearly appears: Morrison v. Berlin, 37 Wash. 600, 79 Pac. 1114. In Colton [210] Land etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878, the court said: "The court had jurisdiction of the parties to the action and of the subject matter, and upon a collateral attack every presumption will be indulged in support of its judgment. If necessary, therefore, it will be assumed that the former judgment was vacated by consent of the parties, and that an order showing such consent and the vacating of the judgment appears in the minutes of the court."

The same court, in Parker v. Altschul, 60 Cal. 380, said: "All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and as the consent of the defendants would have justified the order of the court, we must presume that such consent was given, there being nothing in the record to show that it was not." In support of the proposition that a trial court, after entering judgment, commits error if it vacates that judgment for mere error of law, respondent cites Coyle v. Seattle Electric Co., 31 Wash. 181, 71 Pac. 733. In that case, however, the party aggrieved appealed from the order of vacation, and the entire record and attending facts were thus brought up for review. In this case respondent neither appealed from the order of vacation nor attacked it in the court below. The case cited is, therefore, not applicable here. In the absence of an appeal from the order of vacation, or of a direct attack thereon, the presumption as to regularity, within the authorities above cited, must obtain. The order of vacation was a final one affecting a substantial right of respondent with respect to the extension of the time within which appellants could appeal, and it was therefore appealable: State v. Tallman, 38 Wash. 132, 80 Pac. 272. Moreover, while the last order remained in force, the first one, which had been set aside, was functus officio, and was one from which appellants could not appeal. The first dismissal had been set aside. The last order dismissed the petition, and it was the one in force. It is the [211] dismissal of the petition of which appellants complain, and they were therefore required to appeal from the last order and not from the first which, as the record stood, was without vitality. "So long as this

last judgment remains in force, and not appealed from, the first order is not the subject of appeal; since it would be of no service to the appellants to reverse the first order and leave in force the last order affirming it": Horn v. Volcano Water Co., 18 Cal. 141. See, also, Luck v. Hopkins, 92 Tex. 426, 49 S. W. 360; Keystone Iron Works Co. v. Douglass Sugar Co., 55 Kan. 195, 40 Pac. 273. For the foregoing reasons, the motion to dismiss the appeal is denied.

It is urged by appellants that the court erred in dismissing their amended petition contesting said alleged will. One ground of the dismissal was that the petition was not filed within one year after the entry of the decree of probate. It will be remembered from the preliminary statement herein that the original petition in contest was filed long within the year, and that respondent answered that petition. A second petition was also filed within the year, but soon after the expiration of the year respondent moved to strike it because not properly verified. This motion was granted by the court, but accompanied with the express condition that appellants should have leave to amend. They did amend the verification by simply stating that the petitioners were nonresidents and not within King county. The petition so amended was filed after the expiration of the year from the date of the order admitting the alleged will to probate.

Appellants argue with much force that the statute authorizing the contest of wills and outlining the procedure therefor does not require that petitions in such contests shall be verified. It is certain that the statute does not in terms say that a verification is required. We shall not, however, decide that question now, but shall meet the point raised here on respondent's theory that the petition should be verified [212] in accordance with the general provisions of the code in reference to the verification of pleadings. Ballinger's Code, section 4955, provides that: "Any pleading not duly verified and subscribed may, on motion of the adverse party, be stricken out of the case." The petition which was stricken was both subscribed and sworn to by counsel. It was not "duly" verified, in that the reason why counsel verified it was not stated, as required by Ballinger's Code, section 4925. While the above quotation from section 4955 shows that a pleading not duly verified may, on motion, be stricken, yet the same section provides that, when such motion is allowed, the court may permit the party to file an amended pleading.

That is just what the court did in this case. In an ordinary civil action or proceeding it is manifest that jurisdiction is not lost when a pleading is merely stricken and an amendment allowed. The court retains jurisdiction and the action proceeds. We see no reason why it should be held that a different rule applies to the proceedings for the contest of wills. It is true that Ballinger's Code, section 6110, provides that a contest shall be instituted within one year from the probate of the will, but it was so done in this case, if we assume that the probate decree was valid, and the parties were before the court long before the year expired. The mere fact that the petition was stricken and the amendment permitted after the year expired did not make it a contest instituted after the year. The court already had jurisdiction of the subject matter and of the parties. By permitting the amendment, and by virtue of the statute allowing it, jurisdiction was retained. Moreover, for reasons which will be hereinafter stated, no valid decree admitting this alleged will to probate was ever entered. For this additional reason appellants were not limited in their time to file their petition to one year from the date of the entry of a decree which was void. We therefore think the court erred in dismissing appellants' amended petition on the ground that the contest was not instituted within one year from the probate of the will.

213 The court also granted respondent's motion to dismiss the petition for want of prosecution, and this is also assigned as error. The delay was occasioned by reason of certain proceedings instituted by appellants in the circuit court of the United States for the district of Washington. Respondent contends that, by the institution of said proceedings, appellants in effect abandoned the courts of the state, and that this contest has not been prosecuted in good faith. We shall not undertake to inquire into the motives of appellants in seeking the aid of another tribunal. It is sufficient to say that their contention was regarded by the aforesaid court of sufficient seriousness to lead it to believe that it had jurisdiction to hear and determine a contest over this same alleged will and between the same parties who are litigating in this proceeding. The court determined the matter adversely to this respondent, and issued its injunction preventing her from further asserting any rights under the alleged will. It is true the decision of that court was afterward reversed by the United States circuit court of appeals,

ninth circuit (Carrau v. O' Calligan, 125 Fed. 657), and the decision of the last-named court was affirmed by the supreme court of the United States: O'Callaghan v. O'Brien (U. S.), 25 Sup. Ct. Rep. 727. The mere fact that the federal trial court erred in holding that it possessed jurisdiction did not remove the necessity or propriety for respect to its decree and injunction while the matter remained finally undetermined in the two appellate courts mentioned. Appellants could not proceed with the contest here waged without requiring respondent to violate the terms of the decree of the federal court by resisting the contest, or without compelling her to simply stand by and allow them to proceed without resistance. Under such circumstances we think it was error to dismiss the petition for want of prosecution. Whatever procedure may have been had in the federal court, the fact remains that an undetermined contest is pending in the state
214 court, and we think it is the duty of that court to determine it.

From what has been said it will be seen that the judgment appealed from must be reversed. In anticipation of a reversal, appellants further contend that the record before us discloses that the decree admitting the alleged will to probate is void; that being void, the time has now passed within which the will can be offered for probate, and that in remanding the case this court should so declare, so as to avoid the necessity of a contest. We shall first inquire into the contention that the decree of probate is void. In pursuance of the terms of Ballinger's Code, section 4606, proof in support of the will was offered to the court within six months after the alleged speaking of the testamentary words. The words were also committed to writing and a citation in form was issued, directed to the widow and next of kin of the deceased. We have seen that the citation was issued on the day that the petition for probate was filed and was returned by the officer the same day, who recited in his return that such widow and next of kin could not be found in the county. It is conceded that there was neither widow nor child of said deceased, but no service of the citation was made, either personally or otherwise, upon any next of kin. Upon the citation and return aforesaid, the decree admitting the alleged will to probate was entered and all these proceedings occurred in one day. Section 4606, supra, requires that a citation shall be directed to the widow or next of kin

"that they may contest the will if they think proper." Manifestly, some service of the citation, either personal or otherwise, was necessary in order to advise the next of kin so that they might contest the will. Moreover, Ballinger's Code, section 6083, provides as follows: "In all cases in which citations are issued from the superior court in probate proceedings, they shall be served at least ten days before the term [time] at which they are made returnable, except when issued from the court in cases [215] where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court."

The word "term," as originally used in the statute, is now obsolete by reason of the abolishment of statutory terms of courts, and that word should doubtless now be read as "time," thus making the service necessary at least ten days before the time set for hearing. The citation issued in the case at bar was not only not served, but it was made returnable on the same day it was issued. It was therefore void as process, in that it did not conform with important statutory requirements. Without any valid process and without notice or appearance, the court was manifestly without jurisdiction to enter the decree, and it is therefore void. In view of the fact that the record shows that the decree is void for want of jurisdiction to enter it by reason of lack of process, we have passed thereon, because the validity of that decree was involved in the judgment of dismissal from which this appeal was taken. That judgment in effect ratified the validity of the decree and left it of record as establishing the validity of the alleged will. Appellants' petition called to the court's attention the invalidity of the decree, and by its dismissal of the petition the court declined to purge its records of the void decree. The determination of this question also makes clear the present status of the parties in relation to the proof of the proposed will and the contest thereof.

Referring now to appellants' further contention that the time has passed within which the will may be presented for probate, we have to say that the record shows that a petition for its probate was filed within the time required by statute. The alleged testamentary words were reduced to writing, and proof in support thereof was "offered" (using the statutory word) within the required time. It then became the duty of the court to cause proper citation to issue [216] in order

that it might be properly served and jurisdiction to hear and consider the offered testimony thereby obtained. The statute does not require that the citation shall necessarily be issued and served within six months after the testamentary words are spoken, but it does require that proof shall be offered within that time. We think, therefore, that respondent proposed the will for probate and offered her proof within the required time, and that she has not lost her opportunity to have her petition and proofs considered by the court. The decree of the court being void, the matter now stands as if no decree had been entered, and the court will hear the matter as on original hearing. The burden of proof in support of the alleged will is upon respondent, and is in no manner shifted to appellants by reason of the void decree. The interested parties having appeared and being now before the court, jurisdiction is vested, and the hearing of proof in support of the alleged will and of evidence in support of the contest thereof can proceed.

Appellants further contend that the record shows that the proposed will is invalid upon its face, in that the alleged spoken words do not constitute a will under the laws of this state, and that a nuncupative will is ineffective when the estate bequeathed exceeds in value the sum of two hundred dollars. We are urged by appellants with much earnestness to pass upon these questions at this time. They are matters, however, which have never been passed upon by the trial court after a hearing. They involve the pith of this whole controversy, and are the very matters to be determined by the trial court after a full hearing. Respondent contends that this court has not the power to pass upon those questions now. Even if both parties were now consenting that this court should give its opinion as requested by appellants, it is manifest that it would be no more than advisory, and would not be binding as a judicial decision if the cause should again be brought here on appeal. However much it might serve present convenience [217] to now have the opinion of this court, we do not deem it advisable to depart from the well-known rule governing appellate courts which requires that their decisions on appeal shall be confined to questions which have been duly litigated before and passed upon by trial courts. More especially do we think this rule should obtain with respect to the vital questions which underlie the whole controversy.

The judgment appealed from is therefore reversed, and the cause remanded, with instructions to the trial court to purge its record of the said void decree, and otherwise proceed in accordance with what has been hereinbefore said.

Mount, C. J., Crow and Fullerton, JJ., concur.

Root, J., took no part.

Collateral Attack upon Judgments is the subject of a monographic note to Morrill v. Morrill, 23 Am. St. Rep. 104-119. As against collateral attack the judgments and orders of courts of general jurisdiction are presumed regular: Providence County Sav. Bank v. Hughes, 26 R. I. 73, 106 Am. St. Rep. 682; Dunlap v. Savings Bank, 69 S. C. 270, 104 Am. St. Rep. 796; Haup v. Simington, 27 Mont. 480, 94 Am. St. Rep. 839; Kalb v. German Sav. etc. Soc., 25 Wash. 349, 87 Am. St. Rep. 757; Burke v. Interstate Sav. etc. Assn., 25 Mont. 315, 87 Am. St. Rep. 416; Gulickson v. Bodkin, 78 Minn. 33, 79 Am. St. Rep. 352.

An Appearance Within the Time Limited by Statute to contest the validity of a will or set aside the probate thereof is a jurisdictional fact, and is necessary to put the machinery of the court in motion, so as to contest the validity of the will. Such grant of jurisdiction is to be exercised only in case it is invoked within the time limited, and is not a limitation upon the exercise of a jurisdiction already existing: Storrs v. St. Luke's Hospital, 180 Ill. 368, 72 Am. St. Rep. 211. See, in this connection, Whitaker v. McKinney, 134 Ala. 326, 92 Am. St. Rep. 37; Raleigh v. First Judicial Dist. Court, 24 Mont. 306, 81 Am. St. Rep. 431.

LARSON v. AMERICAN BRIDGE COMPANY.

[40 Wash. 224, 82 Pac. 294.]

EVIDENCE.—The Declarations of an Alleged Agent are not admissible to prove his agency. (p. 906.)

CONTRACT, Construction of is for the Court.—If a contract is in writing and unambiguous, its construction is for the court, without submission to the jury. (p. 907.)

CONTRACTORS, INDEPENDENT, Who are.—The general test which determines the relation of an independent contractor is that he shall exercise an independent employment and represent his employer only as to the result of his work, and not as to the means whereby it is accomplished. The chief consideration is that the employer has no right of control as to the mode of doing the work, but the reservation to the employer of the right to supervise the work for the purpose merely of determining whether it is being done in accordance with the contract, does not affect the independence of the relation. (p. 907.)

CONTRACTOR, Independent Subcontractors, When are.—Where the means by which a work is to be accomplished are entirely

under the control of a subcontractor, and the latter employs servants who aid in the construction of the work, and where the original contractor is not shown to have been negligent in the selection of the subcontractor or in furnishing defective material or otherwise, the subcontractor becomes an independent contractor, and his employer is not liable for injuries arising from the former's negligence. (pp. 907, 908.)

MASTER AND SERVANT, Original Contractor and Servants of Independent Contractors.—In the case of employés, the relation of master and servant does not exist between the original contractor and those engaged upon the work as employés of an independent contractor. (p. 908.)

TRIAL—Estoppel, When does not Arise from Submitting Special Issues.—A request for the submission of special interrogatories to the jury does not estop a party from urging that there was no evidence bearing on the questions respecting which the interrogatories were submitted, where such party had, before making the request, challenged the sufficiency of the evidence on motions for a nonsuit and to direct a verdict in his favor. (p. 908.)

APPEAL AND ERROR—Right to Have Cause Remanded for Dismissal.—Where, on the trial of an action, there is a motion for a nonsuit and also that the jury be instructed to find for the defendant on the ground of want of evidence to sustain a recovery against him, and these motions are denied and a verdict and judgment given for the plaintiff, the supreme court, on appeal, finding that the motions should have been granted by the trial court, may direct that the cause be remanded, with instructions to dismiss the action. (p. 909.)

Robertson, Miller & Rosenhaupt, for the appellant.

Graves, Palmer, Brown & Murphy, for the respondent.

225 HADLEY, J. This is an action to recover damages for personal injuries. The defendant Centennial Mill Company is the owner of a flour-mill situate in the city of Spokane. The complaint alleges that said defendant was engaged in the construction of certain steel storage wheat tanks adjacent to its mill; that the defendant American Bridge Company of New York carries on the general business of coustructing iron and steel structures within the state of Washington, and was engaged in the construction of said tanks as a contractor, subject to the control of its codefendant; that the plaintiff, as a structural iron-worker, was in the employ of the defendants, engaged by them to work upon the construction of the tanks; and that while so at work he was injured by reason of the falling of a platform, owing to the negligence of the defendants.

The mill company answered that it entered into a contract with its said codefendant, whereby the latter was to furnish and deliver all material, and was to manufacture
226 and erect the said steel tanks; that the mill company under

said contract had neither authority to employ the plaintiff nor to exercise any supervision over him, nor any other person employed in the erection of the tanks; and that the plaintiff was working for other persons who were independent contractors. The codefendant, the American Bridge Company, also denied that plaintiff was in its employ, and alleged that he was working for other persons who were independent contractors.

The cause was tried before a jury. At the close of the testimony submitted by the plaintiff the defendants each challenged the sufficiency of the evidence, and moved that the case be withdrawn from the jury, and that judgment of dismissal be entered as to each defendant. The motion was granted as to the Centennial Mill Company, but denied as to the American Bridge Company. The latter then submitted its testimony, and, at the close of all the testimony, renewed its challenge to the evidence, and again moved for judgment of dismissal. The challenge and motion were denied, and the cause was submitted to the jury under instructions. A verdict was returned in favor of plaintiff.

It is assigned that the court erred in granting the new trial, and a new trial granted. From the order granting the new trial, the plaintiff prosecutes this appeal.

It is assigned that the court erred in granting the new trial. The record shows that the court granted the new trial on the theory that there was no competent evidence showing that appellant was employed by, or was working for, the American Bridge Company at the time of the accident. It was contended below, and is contended here, that there was such evidence. We think, however, that the evidence wholly showed that the American Bridge Company sublet the contract for the erection of the tanks to Gerrick Brothers, and that appellant was in the employ of the latter. It is our view that there was no competent evidence to the contrary. It is true, the court permitted appellant to testify [227] over respondent's objection, that one of the Gerricks said to him, in effect, that the American Bridge Company was doing the work, and that he (Gerrick) was working for said company. We think the evidence admitted as aforesaid was clearly inadmissible. It was merely testimony concerning the declaration of said Gerrick as to his own agency for the American Bridge Company. This court has repeatedly held that the declaration of an agent is not admissible

to establish his agency: Comegys v. American Lumber Co., 8 Wash. 661, 36 Pac. 1087; Western Security Co. v. Douglass, 14 Wash. 215, 44 Pac. 257; Gregory v. Loose, 19 Wash. 599, 54 Pac. 33.

Appellant alleged in his complaint that he was in respondent's employ, and the burden was upon him to show that fact. The testimony, however, showed that respondent was not engaged in the actual erection of the tanks, but that the work was being done under subcontract by Gerrick Brothers, and that appellant was in their employ. The contract between respondent and Gerrick Brothers was in writing, was ambiguous, and should have been construed by the court without submission to the jury. Respondent has cited numerous authorities upon this point, but the proposition is so generally established by authority that we shall not reproduce the citations here. Under said contract Gerrick Brothers entered upon and prosecuted the work of erecting the tanks, and were so engaged when appellant, as their employé, was injured. One of the Gerricks so testified at the trial, the other having died from injuries received in the same accident. The Gerricks had sole charge of the erection work, controlled the method of doing it, and employed the men for that purpose, of whom appellant was one.

Were they independent contractors? The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent his employer only as to the results of his work and [228] not as to the means whereby it is to be accomplished. The chief consideration is that the employer has no right of control as to the mode of doing the work; but a reservation by the employer of the right to supervise the work, for the purpose of merely determining whether it is being done in accordance with the contract, does not affect the independence of the relation: 16 Am. & Eng. Ency. of Law, 2d ed., 187, 188. Where the means by which the work is to be accomplished are entirely under the control of the subcontractor, where he alone employs the servants who aid in the construction work, and where the original contractor is not shown to have been negligent in the selection of the subcontractor, or in furnishing defective material, or otherwise, the subcontractor becomes an independent contractor, and his employer is not liable for injuries arising from the former's neglect. Under such circumstances there is no privity be-

tween the original contractor and the injured persons. In the case of employés, the relation of master and servant does not exist between the original contractor and those engaged upon the work as employés of the independent contractor. The doctrine of respondeat superior does not apply. In support of these general principles see Ziebell v. Eclipse Lumber Co., 33 Wash. 591, 74 Pac. 680; Miller v. Moran Bros. Co., 39 Wash. 631, 81 Pac. 1089; Aldritt v. Gillette-Herzog Mfg. Co., 85 Minn. 206, 88 N. W. 741; Hughbanks v. Boston Inv. Co., 92 Iowa, 267, 60 N. W. 640; Pioneer Fireproof Const. Co. v. Hansen, 176 Ill. 100, 52 N. E. 17. Respondent cites many other cases, a number of which are also cited in the opinions above mentioned. In consideration of the authorities defining and applying the doctrine of independent contractor, we think all the evidence in this case shows that Gerrick Brothers were such. Appellant having been in their employ, no privity existed between him and respondent, and the latter is not liable.

Respondent submitted special interrogatories to the jury on the question of independent contractor. The jury answered [229] them against respondent, and appellant urges that respondent is now estopped from claiming that there was no evidence in support of the verdict and findings of the jury. Appellant cites Dixon v. Bausman, 17 Wash. 304, 49 Pac. 540, and Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564. We think the cases are not controlling here, for the reason that it does not appear in either case that either a motion for nonsuit or challenge to the evidence was interposed. And moreover, in each case the opinion shows that there was evidence in support of the findings, which we have seen is not true in the case at bar. Respondent seasonably challenged the sufficiency of the evidence, both at the close of appellant's testimony and also at the close of all the testimony. Having been overruled, it was compelled to yield to the view of the court, and the mere fact that it submitted special interrogatories should not make the answers binding when there was no evidence whatever to support them. The fact that the jury answered the questions with no evidence upon which to base the answers does not make them binding, but shows that the jury were not unbiased, and for that reason the findings should be set aside: Atchison etc. R. Co. v. Hine, 5 Kan. App. 748, 47 Pac. 190; Southern Kansas R. Co. v. Michaels, 49 Kan. 388, 30 Pac. 408; Jeffrey v. Keokuk etc. R.

Co., 51 Iowa, 439, 1 N. W. 765; Waterbury v. Chicago etc. R. Co., 104 Iowa, 32, 73 N. W. 341.

When ruling upon the motion for new trial, the court stated that, as there was no competent evidence whatever to sustain the findings, they would be set aside. The court was then convinced that it had misapprehended the evidence at the time respondent interposed its challenge thereto. Such was clearly the case, and it was not error to set aside the findings and also the general verdict.

Respondent asks, inasmuch as the evidence shows no cause of action against it, that the cause shall be remanded with instructions to dismiss the action. We think this request [230] should be granted. Respondent was entitled at the trial to have its challenge to the evidence sustained, and it is still entitled to it: Bernhard v. Reeves, 6 Wash. 424, 33 Pac. 873.

The action of the court in setting aside the verdict is affirmed; but the cause is remanded, with instructions to vacate so much of the order as grants a new trial, and to enter a judgment dismissing the action.

Mount, C. J., Dunbar and Crow, JJ., concur.

Root and Fullerton, JJ., took no part.

The Liability for the Negligence of an Independent Contractor is discussed in the monographic note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 382-428. The general rule is, that the principle of respondeat superior does not ordinarily extend to the acts of independent contractors: Chicago v. Murdock, 212 Ill. 9, 103 Am. St. Rep. 221; Hoff v. Shockey, 122 Iowa, 720, 101 Am. St. Rep. 289; Richmond v. Sitterding, 101 Va. 354, 99 Am. St. Rep. 879. In the recent case of Miller v. Moran, 39 Wash. 631, 109 Am. St. Rep. 917, it is said that the principal contractor is not concerned with the details of the performance of the work of an independent contractor, and is not required to know whether he is using appliances which were unsafe for his employés, and is not liable to the employés of such independent contractor because he uses unsafe appliances resulting in their injury.

IN RE RUSSELL.

[40 Wash. 244, 82 Pac. 290.]

HABEAS CORPUS—Judgment of Conviction, When Conclusive of the Jurisdiction.—A judgment convicting the defendant of larceny in a county designated in the indictment cannot be collaterally attacked on habeas corpus by proof that the crime was committed on a United States military reservation within the same county of which the convicting court had not jurisdiction. (p. 912.)

Oscar Cain, for the appellant.

Lester S. Wilson, for the respondent.

244 CROW, J. On September 10, 1904, an information was filed in the superior court for Clarke county, charging appellant, Charles B. Russell, with stealing one head of neat cattle, and upon a plea of guilty he was sentenced to a term of three years in the penitentiary at Walla Walla, where he is now confined serving said sentence. On May 11, 1905, appellant applied, by petition, to the superior court for Walla Walla county, for a writ of habeas corpus, claiming that he was illegally restrained of his liberty by respondent, A. F. Kees, warden of the state penitentiary, 245 and alleging that the crime for which he was serving sentence had been committed upon the United States military reservation, in said Clarke county, over which the superior court of said county had no jurisdiction.

A writ having been issued, respondent made return thereto, showing that an information had been filed in the superior court of Clarke county, charging appellant with stealing one head of neat cattle in said county; that appellant had been duly arraigned and pleaded guilty; that thereupon said court entered judgment, imposing upon him a sentence of three years in the state penitentiary at Walla Walla; that the sheriff of Clarke county had delivered the person of said Russell to the warden of said penitentiary, together with a warrant of commitment, issued out of said superior court of Clarke county; and that respondent, as warden of said penitentiary, was holding appellant under said judgment, sentence, and commitment.

Certified copies of the information, arraignment, plea of guilty, judgment, sentence and commitment, which are attached to respondent's return as a part thereof, and not denied, show all of said proceedings to have been regularly and

legally had and conducted, in and by a court of competent jurisdiction. No reference is made therein to any military reservation, but such records simply show the crime to have been committed in Clarke county. Upon the hearing, the superior court of Walla Walla county refused to discharge the appellant, but remanded him to the custody of respondent, and this appeal has been taken.

Upon the hearing appellant offered evidence tending to show that he had stolen said one head of neat cattle upon the United States military reservation in Clarke county, and said evidence was admitted by the trial court, subject to objection, for the benefit of either party upon appeal. The record fails to show affirmatively that the trial judge considered said evidence, but appellant contends it was not considered. Appellant's purpose in offering said evidence [240] was to support the claim made by him that the superior court of Clarke county had no jurisdiction of the crime charged, for the reason that it was committed upon said United States military reservation, appellant relying on subdivision 17, section 8 of article 1 of the constitution of the United States, and section 1 of article 25 of the constitution of the state of Washington, to show such want of jurisdiction. Respondent objected to said evidence, for the reason that it made a collateral attack upon the final judgment of a court of competent jurisdiction, in violation of Ballinger's Code, section 5826, which provides: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: (1) Upon any process issued on any final judgment of a court of competent jurisdiction."

As the record of the conviction and commitment of appellant appears upon its face to have been regular, and had in a court of competent jurisdiction, we think respondent's objection was well taken, and that said commitment issued on said final judgment of said superior court of Clarke county was conclusive as against appellant: In re Lybarger, 2 Wash. 131, 25 Pac. 1075; In re Nolan, 21 Wash. 395, 58 Pac. 222; Smith v. Hess, 91 Ind. 424. This court, speaking through Hoyt, J., in Re Lybarger, said: "When the officer returns as his authority for holding a prisoner a commitment which shows upon its face that such person is committed by a court of general jurisdiction in pursuance of its final judg-

ment for a crime triable by such court, we think he has brought himself within the provisions of our statute, and that the courts are, by the terms thereof, precluded from inquiring further into the cause of detention; and that neither by having the record set out in the petition nor by bringing it here by certiorari can this court look therein to see whether or not the court had jurisdiction in that particular case."

247 The state of Indiana, in its habeas corpus act, has the same provision as Ballinger's Code, section 5826, supra, and in Smith v. Hess, 91 Ind. 424, the supreme court of that state says: "A judgment by a court of competent jurisdiction, valid upon its face, and a valid commitment under it, is an unanswerable return to a writ of habeas corpus."

Appellant insists that, in showing said crime to have been committed on the military reservation, he did not contradict the record, as such reservation is situated within Clarke county, in which the venue of the crime was laid; that by said evidence he only sought to show there is a portion of Clarke county over which the courts of the state can exercise no criminal jurisdiction, a fact consistent with every statement of the record. We fail to see any merit in this contention, for, after all, appellant only seeks by evidence of extrinsic facts to attack the jurisdiction of the court, which he cannot be permitted to do. On his trial he might have made a defense to the charge contained in said information, based on facts involved in the claim now presented by him; but, when he pleaded guilty, he waived that defense, and placed himself in the same position he would have occupied had he been convicted by the verdict of a jury and failed to appeal from a judgment entered upon said verdict. The court had jurisdiction of the subject matter, and also of appellant's person. The question as to where, in Clarke county, the crime was committed, or whether it was committed in said county at all, was an issue of fact to be determined by a jury, on a trial had on said information. Such question did not affect the jurisdiction of the court over either the subject matter or the person of appellant, and, having pleaded guilty, he is now in no position to raise any question on an application for a writ of habeas corpus as to the jurisdiction of the court over the place where the crime was committed.

248 Speaking of jurisdiction, Church, in his work on Habeas Corpus, at section 368, says: "While the writ of habeas cor-

pus cannot be made to take the place of a writ of error, appeal or certiorari, and cannot have the force or effect of those proceedings, jurisdiction of the person, place and subject matter, at least, must exist in order to make a valid judgment, and if either is wanting, the judgment is void, and the imprisonment without authority of law. The question of jurisdiction over the subject matter is one of fact, to be proved or admitted, as any other fact alleged. Ordinarily, in criminal trials, the jurisdiction of the court over the place where the offense is alleged to have been committed is assumed. If admitted by pleading over, that ends the matter. If traversed, and the jury find that the prisoner committed the offense within the jurisdiction of the court, as alleged, the defendant cannot impeach that finding on habeas corpus by showing that the place where the offense was committed is without the said territorial limits." See, also, In the Matter of Francis Robert Newton, 16 Com. B. 96, in which the first syllabus, which states the substance of the opinion of the court, reads as follows: "This court has no power to grant a habeas corpus to bring up a prisoner who has been convicted at the central criminal court, on the ground that the offense charged was committed at a place out of the jurisdiction of that court."

In Ex parte Terry (Kan.), 80 Pac. 586, the supreme court of Kansas says: "Testimony was offered in this proceeding tending to show that the petitioner was not guilty of the offense of which he was convicted; that it was in fact committed in a county other than the one named in the complaint. His plea of guilty was an acknowledgment of the charge made against him, and, even if this were an appeal, the inquiry would be limited to whether the facts charged constituted an offense, and whether the sentence imposed was within the limits fixed by the statute. Certainly the judgment cannot be set aside and the case retried on habeas corpus."

[249] In Ex parte Edginton, 10 Neb. 215, the petitioner was found guilty of conducting a quartz-mill in Virginia City without obtaining a license, as required by an ordinance of said city, and was imprisoned in pursuance of such conviction. On the hearing of his petition for a writ of habeas corpus proof was introduced tending to show that his quartz-mill was outside of the limits of said city, and that he was not liable for said license. The supreme court of Nevada, in refusing a writ of habeas corpus, said: "The petition for the writ of habeas corpus in this case and the return thereto,

to which there is no exception, shows that the petitioner is detained in custody by virtue of a final judgment of a justice of the peace of Virginia City, convicting him of violating an ordinance of that corporation. It is conceded that the justice of the peace had jurisdiction of the offense charged, as well as of the prisoner, and that a legal ordinance authorizes the judgment. Such being the case, it is made our imperative duty to remand the prisoner by the plain terms of our habeas corpus act (1 Compiled Laws, section 367), and we cannot, without pronouncing an extra-judicial opinion, undertake to decide whether the business of the petitioner was carried on within the corporate limits of Virginia City or not. That was a question to be decided on the trial, and if it was decided erroneously in point either of law or fact, the remedy is by appeal and not by habeas corpus."

The section referred to by the Nevada court as section 367 is almost identical with said Ballinger's Code, section 5826, supra, the Nevada statute providing that it shall be the duty of the judge to remand the petitioner if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.

We are of opinion that the proceedings of the superior court of Clarke county, as shown by respondent's return, were conclusive in this proceeding as against appellant. The judgment is affirmed.

Mount, C. J., Root, Hadley, and Dunbar, JJ., concur.

Habeas Corpus is not a proper remedy for inquiring into mere errors and irregularities leading up to a judgment of a court of competent jurisdiction, nor into mere defects in the judgment or sentence itself, nor irregularities after it has been pronounced. To entitle one to be released on habeas corpus, from a judgment restraining him from his liberty, the judgment must be void, and not merely erroneous: See the monographic note to Koepke v. Hill, 87 Am. St. Rep. 167-202; Bronk v. State, 43 Fla. 461, 99 Am. St. Rep. 119; Younger v. Hehn, 12 Wyo. 289, 109 Am. St. Rep. 986.

STATE v. SUPERIOR COURT.

[40 Wash. 443, 82 Pac. 875.]

MANDAMUS, Appeal, Where not an Adequate Remedy.—If a court having no jurisdiction to do so directs a change of venue to another county, the fact that any judgment which might be rendered in the court to which the transfer is made could be revised on appeal does not constitute an adequate remedy, and mandamus may issue to compel the court making the order of transfer to try the action. (p. 916.)

VENUE, Construction of Statute Authorizing Changes of.—Statutes conferring a right to a change of venue are in furtherance of justice and should be liberally construed so as not to defeat the right. (p. 916.)

VENUE, Change of in Garnishment Proceedings.—Statutes authorizing a change of venue where an impartial trial cannot otherwise be had or where convenience and justice will be forwarded by the change apply to garnishment proceedings. (pp. 918, 919.)

James A. Williams and Denton M. Crane, for the relator.

Graves & Graves and B. H. Kizer, for the defendants.

445 RUDKIN, J. Original application for a writ of mandamus. The relator brought an action in the superior court of Spokane county against A. E. Flower and wife, and at the same time caused writs of garnishment to issue against certain insurance companies. Flower and wife suffered a default in the main action, and a final judgment was entered against them. The insurance companies made return to the writs of garnishment, denying liability to the defendants in the main action, and the relator filed affidavits controverting the returns, as required by statute. Thereupon the insurance companies, as garnishees, applied to the court in due form for a change of place of trial of the garnishment proceedings to Kittitas county, on the ground that the convenience of witnesses and the ends of justice would be forwarded by the change. The relator resisted this application, on the ground that the provisions of our statute relating to a change of the place of trial do not apply to garnishment proceedings, and that the court was without jurisdiction to grant the application. The court overruled the objection and allowed the application. The relator thereupon applied to this court for a writ of mandate, directing the court below to proceed with the trial notwithstanding the change of venue, basing its right to the writ upon the same grounds as were urged in its objection to the granting of the application.

At the threshold of the proceeding the respondent raises the objection that the relator has an adequate remedy by appeal, and that mandamus will not lie. If the contention of the relator is correct, viz., that the superior court of Spokane county had exclusive jurisdiction to hear and determine the garnishment proceedings without power or discretion to order a change of venue, mandamus is the proper remedy. The mere fact that the superior court of Kittitas county, to which the proceedings have been transferred, may erroneously assume jurisdiction, and that the proceedings may in that way eventually reach this court by appeal, is not, in our opinion, an adequate remedy.

[446] We cannot, however, agree with the contention of the relator that the provisions of our statute (Ballinger's Code, section 4857) authorizing a change of venue where there is reason to believe that a fair and impartial trial cannot be had in the county where the action is pending, or where the convenience of witnesses or the ends of justice will be forwarded by the change, do not apply to garnishment proceedings. Statutes conferring the right to a change of venue are enacted with a view of affording litigants a fair and impartial trial. They are in furtherance of justice, and should be liberally construed so as not to defeat the right: 4 Ency. of Pl. & Pr. 380; Buck v. City of Eureka, 97 Cal. 135, 31 Pac. 845; Packwood v. State, 24 Or. 261, 33 Pac. 674. In the last case cited, the court says: "These provisions of the statute should receive a broad and liberal, rather than a technical and strict, construction, and the courts ought not to be too astute in discovering some refined and subtle distinction to avoid their operation, for, as was said by Mr. Justice Graves, 'The immediate rights of the litigants are not the only object of the rule, but sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observation': Stockwell v. Township Board of White Lake, 22 Mich. 349."

The relator has cited a large number of authorities, but they have no direct application to the question now under consideration. They discuss the general nature of garnishment proceedings, the court of original jurisdiction to issue the writ, and the right to a change of venue on the ground of residence of the garnishee. In Kelly v. Ryan, 8 Wash. 536, 36 Pac. 478, cited by the relator, the court held that the

garnishment proceeding was simply a step in the main action, was ancillary thereto, and that the plaintiff was not required to pay an additional docket fee of four dollars upon suing out a writ of garnishment. In so far as the court there held that the garnishment was but a step in the main action and [447] was ancillary thereto, the decision is in accord with all the authorities.

In Title Guarantee etc. Co. v. Northwestern Theatrical Assn., 23 Wash. 517, 63 Pac. 212, the court held that a change of venue in the main action carried the garnishment proceeding with it, and that Ballinger's Code, section 4854, which provides that an action against a corporation shall be brought in a county where it has an office for the transaction of business, has no application to a garnishment proceeding. In Miller & Co. v. Mason & Co., 51 Iowa, 239, 1 N. W. 483, the court held that a garnishee was not entitled to demand a change of venue to the county of his residence. The two cases last cited are not in point here. The county in which the main action is pending is the proper county in which to sue out a writ of garnishment, regardless of the place of business of a corporation or the residence of the garnishee, and to that extent the garnishment statute supersedes other statutes requiring certain actions to be brought in a particular county. Thus, notwithstanding the decision in Miller & Co. v. Mason & Co., 51 Iowa, 239, 1 N. W. 483, the same court said in Westphal, Hinds & Co. v. Clark, 42 Iowa, 371: "If the garnishee should be satisfied that he could not obtain a fair trial in the county wherein the main cause was tried, and should make the proper showing, it would not, we apprehend, be claimed that he would not be entitled to a change of venue."

On the other hand, in Hewitt v. Follett, 51 Wis. 264, 8 N. W. 177, it was held that a third party, brought into a garnishment proceeding at the instance of the garnishee, could demand a change of venue as a matter of right, upon filing the statutory affidavit. In Burkett v. Holman, 104 Ind. 6, 3 N. E. 406, Burkett v. Bowen, 104 Ind. 184, 3 N. E. 768, Burkett v. Bowen, 118 Ind. 379, 21 N. E. 38, and Burkett v. Holeman, 119 Ind. 141, 21 N. E. 470, it was held that a party brought in, on proceedings supplementary to execution, was entitled to a change of venue. In Cross [448] v. Spillman, 93 Ala. 170, 9 South. 362, and Martin v. Chicago etc. R. Co., 50 Mo. App. 428, it was held that a

change of venue in the main action or in the garnishment proceeding did not carry the other with it, thus showing that there is no objection to a severance. In People v. Almy, 46 Cal. 245, issues were made up in the probate court in a proceeding to contest a will. The probate court granted a change of venue, and one of the parties applied to the supreme court for a writ of mandate, as in this case, claiming that there was no authority in law for the change. After referring to the various statutes on the subject, the court says: "Considering all these provisions together, we entertain no doubt whatever that in a case like this it is competent for the probate court to order the place of trial to be changed. A different rule would operate, practically, as a denial of justice. In this case a very large estate has been tied up, and its administration impeded for several years, whilst three fruitless trials were being had, at an expense to the estate of nearly ten thousand dollars; and with a very slight probability that for years to come an impartial jury could be had in that county. Nor do we see any practical difficulty which is to result from changing the place of trial. A transcript of the proceedings and the result of the trial can be certified by the court in San Francisco to the court in Marin, on receiving which the latter court will enter the appropriate judgment with proper recitals."

In section 327 of Rood on Garnishment the author says: "The decisions holding that the garnishment follows the main case on change of venue are no authority to the effect that the garnishee cannot have a change of venue, for no judgment can be rendered against him until the main action is in judgment, after which the reasons for keeping the two together are less." See, also, Townshend v. Townshend, 9 Gill (Md.), 506; Backus v. Cheney, 80 Me. 17, 12 Atl. 636; Treasurer v. Wygall, 46 Tex. 447; Kittridge v. Kinne, 80 Mich. 200, 44 N. W. 1051.

449 No serious inconvenience can result to the relator by allowing the change of venue. The only connection between the main action and the garnishment proceeding, so far as we can discover, in this: A voluntary dismissal or judgment for the defendant on the merits in the main action carries the garnishment with it. The judgment against the garnishee cannot exceed in amount the judgment in the main action, and a satisfaction of the principal judgment satisfies the judgment against the garnishee. Any of these steps

in the main action may readily be proved in the court to which the garnishment proceeding has been transferred, by a certified copy of the record. A garnishment proceeding is neither more nor less than an action by the defendant against the garnishee for the use of the plaintiff. It possesses all the elements of any other action. The law contemplates that contingencies will arise where the ends of justice demand a change in the place of trial. A garnishment proceeding comes within the spirit of this law, and is not excluded by the letter.

We are therefore constrained to hold that the court below acted within its jurisdiction, and the application for the writ is accordingly denied.

Mount, C. J., Fullerton, Hadley, and Dunbar, JJ., concur.

Root, J., concurs in the result.

Crow, J., being disqualified, took no part.

Mandamus as a Remedy to Compel a Court to order a change of venue, or to vacate an order changing the place of trial, or to proceed after having made such an order, is discussed in the monographic note to State v. Gardner, 98 Am. St. Rep. 897.

DWYER v. NOLAN.

[40 Wash. 459, 82 Pac. 746.]

DIVORCE, Effect of Death of a Party After.—On the death of the plaintiff after judgment in divorce, there cannot be any substituting of his executors to represent him, nor any proceedings against them, for the purpose of vacating the decree. (p. 920.)

DIVORCE, Vacating Decree of After the Death of a Party.—After the death of a plaintiff in whose favor a decree of divorce has been entered, the court cannot make any order vacating the decree on the ground of want of jurisdiction over the defendant when it was entered, for the reason that there is no one on whom service of the notice to vacate can be made. (p. 921.)

J. W. Langley and Robert D. Devlin, for the appellant.

Boyle & Warburton, for the respondents.

460 DUNBAR, J. This case is appealed from the order of the superior court of King county, refusing to vacate a judgment in a divorce case. The divorce action was brought by

John L. Nolan, and the decree was granted on November 20, 1899. On April 6, 1905, the appellant appeared in this action by motion, and affidavits in support of the same, and sought to have the decree of November 20, 1899, set aside and vacated. The plaintiff, John M. Nolan, having died in January, 1905, his executors were substituted as parties plaintiff. The contention of the appellant is that the court acted without competent jurisdiction of the party defendant in the divorce proceeding, and that the judgment was therefore void.

We will not enter into an investigation of the question presented as to whether or not the service in the divorce proceeding was sufficient to give the court jurisdiction of the person of the defendant, for the reason that there are no proper parties to this proceeding, and that, in the nature of things, the plaintiff having died, the question of divorce cannot be relitigated. It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected but the marital status of the husband and wife. The distribution of property in such an action is incidental, and it is clearly incontestable that, upon the death of either party, whether before or after the decree, the subject of the controversy [461] is eliminated. If the death of the plaintiff in this case had occurred before judgment, it will not be urged that there could have been a substitution of his executors to represent him in the prosecution of the case. Such a proposition, for manifest reasons, would not be entertained by a court for a moment. What additional authority or power did they have to represent him in the same case when he died after judgment? Manifestly none. They cannot stipulate with reference to the decree. They cannot consent to setting aside the judgment. There is no conceivable particular in which they represent the deceased or the heirs with reference to the subject matter of the action, in the slightest degree. The very nature of the action renders this impossible. In the light of this fact, a service upon them of a motion to vacate the judgment is farcical, and the case proceeded, if it proceeded at all, without notice and on a purely ex parte basis.

An argument of necessity is presented by the appellant to the effect that it is impossible, in view of the death of the plaintiff, to get service on anyone else. But this argument defeats itself, for if there is anything which is the subject of litigation, there must of necessity be someone who is interested in that thing and represents it, and upon whom ser-

vice can be made. If there is no such thing, it is equally plain that there is no subject of legal controversy.

Something has been said of the inherent jurisdiction of the court to set aside void decrees. Inherent jurisdiction is no more potent than jurisdiction that is conferred by statute, and it is as much prescribed by orderly methods. It is not a loose, arbitrary and unlicensed jurisdiction, which the court can exercise without restraint, untrammeled by the observance of the methods prescribed by law, but it is simply jurisdiction, and no more. In fact, the court should be more careful, if any distinction is to be made, in the exercise of jurisdiction which is evolved from the decisions of courts, and therefore in a measure self-assumed, than in the exercise [462] of jurisdiction that is conferred by the law-making power. But there is no jurisdiction in courts, inherent or otherwise, to adjudicate the rights of litigants without notice, actual or constructive.

It is suggested that, if the court, upon an examination, finds that the judgment was void for want of service, it will vacate the judgment for the purpose of clearing its records of void judgments. But the parties to an action have as much right to be heard upon that question as on any other. Our statute provides (Pierce's Code, section 362) that, when a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, application, sale or proceeding therein, etc. If this court should enter a judgment of vacation without having jurisdiction of the parties to the judgment, it would be guilty of the same illegal action with which the lower court is charged. So far as the property rights are concerned (if there are any), if the judgment is void, such rights are in no way affected by it, and all the avenues are open for the determination of such rights where the parties affected can all be heard.

The judgment is affirmed.

Mount, C. J., Root, Rudkin, Hadley, and Crow, JJ., concur.

Fullerton, J., concurs in the result.

The Jurisdiction of Equity to Annul a Decree of Divorce, at the suit of a woman, after the death of her husband, who had obtained the decree, is recognized in Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193.

DEATON v. LAWSON.

[40 Wash. 486, 82 Pac. 879.]

PHYSICIANS, Agreement with Purporting to be with a Nonexisting Medical Institution.—An agreement purporting to be made by a state medical institute, it being owned, operated and controlled by one L., must be regarded as his personal agreement, and is void if it is for the performance of medical services which he is incompetent to perform, and cannot perform without violating the laws of the state. (p. 924.)

CONTRACT in Violation of the Laws of a State.—An agreement to perform services as a physician by a person not licensed to practice as such, and which he could not perform without violating the laws of the state, is against public policy and void. (p. 924.)

PHYSICIANS, Assignability of Contracts of.—A contract to render personal services as a physician is nonassignable, and no other person can perform or tender performance of it without the consent of the other contractor. (p. 924.)

Graves, Palmer, Brown & Murphy, for the appellants.

Sweeney & Steiner, for the respondent.

[487] RUDKIN, J. On the eighteenth day of March, 1903, the plaintiff and the defendant, O. V. Lawson, entered into the following written contract:

"This contract and agreement, entered into this 18th day of March, 1903, by and between the officers of the State Medical Institute, and the physician in charge, located at Seattle, State of Washington, the party of the first part, and C. C. Deaton, of Seattle, Washington, the party of the second part:

"Witnesseth: That the party of the first part agrees and contracts to render professional services to the party of the second part until the party of the second part shall be cured of a certain disease, concerning which the party of the second part has this day consulted the party of the first part.

"The party of the second part, for and in consideration of the above agreement, does hereby agree and contract to pay the party of the first part, the sum of ——— dollars ($469) as follows, viz., by cash, $469.

"It is also agreed that the party of the second part follow directions carefully, and to take the medicines and remedies as prescribed from time to time by the party of the first part, until a complete cure is effected.

"In Witness Whereof, The respective parties have hereunto set their hands and seals this 18th day of March, 1903.

"C. C. DEATON.

"S. M. INST."

[488] The circumstances leading up to the execution of this contract, as detailed by the plaintiff, are these: The plaintiff, at the time, was suffering from indigestion and other ills, and called at the office of the State Medical Institute for treatment. He there consulted with the defendant Lawson and with Dr. Richards, a physician in the employ of the defendant, and they guaranteed to cure him within three months for the sum of eighty-five dollars. When the plaintiff came to pay the defendant Lawson he exhibited a considerable sum of money in addition to the eighty-five dollars. On sight of such additional sum, the defendant Lawson forthwith represented to the plaintiff that he could give a different treatment which would effect a permanent cure within six weeks, but that it would cost more. The above contract is the result. The plaintiff received some medicine on the day of the execution of the contract, and returned on the following day for further treatment as directed. On the evening of the second day he told his father what he had done, and his father refused to permit him to take further treatment from the defendants. After this the plaintiff never returned to the defendants' office, and refused to take further medicine or receive further treatment from them. This action was brought to recover the money paid under the contract.

The pleadings admit that the State Medical Institute is owned, operated, managed and controlled by the defendant Lawson. The execution of the contract and the payment of the four hundred and sixty-nine dollars are also admitted. The court found that the defendant Lawson was not entitled to practice medicine under the laws of the state of Washington, not having a license to so practice, as provided by the statutes of said state; that the State Medical Institute has in its employ one Dr. Richards, a regularly licensed physician; that the said Lawson fixed the fees and charges against the plaintiff, collected the same, and signed the written contract upon the part of the State Medical Institute; and that Dr. Richards had nothing [489] whatever to do with fixing the fees or charges, or in making the contract with the plaintiff. The court further found: "That the sum of eighty-five dollars was a reasonable charge for the services agreed to be rendered to the plaintiff, but that the additional charge of three hundred and eighty-four dollars was excessive, and that plaintiff's mental and physical condition was such that he was not capable of entering into any kind of a contract, and

that said purported written contract for this reason is void." On these findings the court rendered a judgment in favor of the plaintiff for the sum of three hundred and eighty-four dollars. The defendants appeal.

The appellants earnestly insist that the finding that the respondent was not capable of entering into any kind of a contract, and that the fees charged were excessive, is without the issues raised by the pleadings, and is not supported by the testimony. If the judgment of the court finds no support in the record aside from this finding, it would be difficult to sustain it. We think, however, that the judgment is amply supported on other grounds. The findings of the court and the entire testimony clearly show that this was the personal contract of O. V. Lawson. The reference in the body of the contract to the State Medical Institute, its officers, and the physician in charge, and the claim of the appellant Lawson that he signed the contract as secretary for Dr. Richards, are but so many pretenses to evade the laws of the state.

It is admitted in the pleadings that the State Medical Institute is owned, operated, managed and controlled by Lawson. In other words, he is doing business under that name. It is further shown that Dr. Richards was not a party to the contract, and was in no manner obligated to perform it. The court finds, and he himself testifies, that he has no connection, directly or indirectly, with the State Medical Institute, has nothing to do with the making of contracts or the fixing of fees, but is simply employed on a salary. If we should sustain the claim of the appellant Lawson that he signed the contract as secretary for Dr. Richards, we have no contract at all, as the record shows clearly that he had no authority in
490 that behalf. Stripped of all subterfuges and pretenses, this is neither more nor less than a contract on the part of appellant Lawson to render professional services for the respondent, a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void.

A contract to render professional services is personal and nonassignable. No person can perform or tender performance except the person therein named, without the consent of the other party to the contract. Inasmuch as the appellant Lawson could not perform his part of the agreement without violating the laws of the state, there was no consideration for the alleged contract or the payment of the money

thereunder, and the respondent is entitled to recover the money so paid, so long as the contract remains executory. The fact that he was not awarded as much as he was entitled to under the law is no ground for reversal.

There is no error in the record and the judgment is affirmed.

Mount, C. J., Dunbar, Crow, Fullerton, Hadley, and Root, JJ., concur.

In the Recent Case of Schnaier v. Navarre Hotel etc. Co., 182 N. Y. 83, 108 Am. St. Rep. 790, it is held that the legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business because some of the partners, who have nothing to do with the plumbing work or its supervision, are not registered as plumbers, and that a contract by such a firm to furnish work and materials is not unenforceable because such members are not licensed. See, too, State v. Brown, 37 Wash. 97, 107 Am. St. Rep. 798.

STATE v. SUPERIOR COURT.

[40 Wash. 555, 82 Pac. 877.]

PROHIBITION, Writs of, Adequacy of Remedy by Appeal as a Bar to.—The adequacy of the remedy by appeal or in the ordinary course of law is the test to be applied in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction, and the adequacy of the remedy by appeal does not depend on the mere question of delay or expense. (p. 928.)

PROHIBITION, Writs of to Enforce Right to a Change of Venue.—If an application is made for a change of the place of trial, supported by proper and sufficient affidavits, and the court denies it, a writ of prohibition will not issue to prevent the court from proceeding with the trial of the cause. The remedy by appeal is adequate. (p. 928.)

Zent & Lovell, for the relators.

Belt & Powell, for the respondent.

555 RUDKIN, J. J. A. Harris commenced an action in the superior court of Spokane county to recover a money judgment against Valentine Miller, George Zier and Conrad 556 Kissler. The defendants Miller and Zier appeared in the action and filed a demurrer, an affidavit of merits, and a motion for change of venue to the superior court of Adams county. This motion was supported by the affidavit of the defendant Miller to the effect that he was a resident of Adams county, at the time of the commencement of the action, and was served with process there; by the affidavit of the defendant Zier to the effect that he was a resident of Lincoln county

at the time of the commencement of the action; and by the affidavit of one of their attorneys to the effect that all of the defendants were nonresidents of Spokane county, and were actual residents of either Lincoln or Adams county at the time of the commencement of the action. The motion for a change of venue was denied, and the defendants Miller and Zier have applied to this court for a writ of prohibition, restraining the superior court of Spokane county from further proceeding in the cause on the ground that it has no jurisdiction.

In State v. Superior Court, 5 Wash. 518, 32 Pac. 457, 771, State v. Superior Court, 7 Wash. 306, 34 Pac. 1103, State v. Superior Court, 9 Wash. 668, 38 Pac. 206, and State v. Superior Court, 15 Wash. 366, 46 Pac. 395, this court held that where a defendant was sued in a transitory action in a county other than the county of his residence, and appeared in the action and filed a proper application for a change of venue, the filing of such application ousted the court of jurisdiction, and that this court would issue a writ of prohibition to restrain further proceedings in that court. If these decisions are followed in this case it will be incumbent on us to consider the merits of the application for a change of venue, otherwise not.

In State v. Superior Court, 20 Wash. 502, 55 Pac. 933, this court reviewed at length its former decisions relating to the extraordinary writs of mandamus and prohibition, and in effect overruled many of [557] them. In that case it was distinctly held that the fact that a court refuses to entertain jurisdiction where jurisdiction is conferred by law, or threatens to assume jurisdiction where jurisdiction is denied by law, is not, of itself, sufficient to warrant the issuance of a writ of mandamus or prohibition from this court. The adequacy of the remedy by appeal, or in the ordinary course of law, is there declared to be the true test in all cases, and not the mere question of jurisdiction or lack of jurisdiction. State v. Superior Court, 20 Wash. 502, 55 Pac. 933, has been followed and approved in many subsequent cases: State v. Hadley, 20 Wash. 520, 56 Pac. 29; State v. Superior Court, 21 Wash. 108, 57 Pac. 352; State v. Moore, 21 Wash. 629, 59 Pac. 505; State v. Superior Court, 21 Wash. 631, 59 Pac. 505; State v. Hogg, 22 Wash. 646, 62 Pac. 143; State v. Moore, 23 Wash. 115, 62 Pac. 441; State v. Superior Court, 24 Wash. 438, 64 Pac. 727; State v. Tallman, 25 Wash. 295,

65 Pac. 545; State v. Tallman, 29 Wash. 317, 69 Pac. 1101; State v. Superior Court, 30 Wash. 700, 71 Pac. 648; State v. Neal, 30 Wash. 702, 71 Pac. 647; State v. Superior Court, 31 Wash. 53, 71 Pac. 740; State v. Superior Court, 31 Wash. 410, 71 Pac. 1100; State v. Superior Court, 32 Wash. 498, 73 Pac. 479; State v. Superior Court, 34 Wash. 643, 76 Pac. 282; State v. Superior Court, 36 Wash. 566, 79 Pac. 29; and is now the established rule on the questions there discussed.

Has the relator an adequate remedy by appeal? As a general rule, the legislature of this state has deemed an appeal from the final judgment an adequate remedy for the correction of all errors committed in the course of a trial, and, ordinarily, an erroneous ruling on a question of jurisdiction is no exception to this general rule. Had the court 558 below ruled that the complaint stated a cause of action, or denied a motion to quash the summons, or the service thereof, it would be just as important to the relators, and just as desirable from their standpoint, to obtain a ruling from this court on these questions, in advance of the hearing on the merits, as in the case at bar; yet all will concede that such questions can only be reviewed on an appeal from the final judgment. As said by the supreme court of Montana on a similar application in State v. Smith, 23 Mont. 329, 58 Pac. 867: "If the writ be proper on the present application, then it might well be invoked to review any intermediate order or decision of a court or judge, such as an order overruling a demurrer to a complaint, or striking out irrelevant matter from a pleading, or granting or refusing a motion to quash a summons, or granting or denying a continuance. Mandamus may not thus be diverted from its legitimate office. From a multitude of cases supporting the conclusion here announced, we cite People v. Sexton, 24 Cal. 78; People v. McRoberts, 100 Ill. 458; State v. Cotton, 33 Neb. 560, 50 N. W. 688; People v. Hubbard, 22 Cal. 35; People v. Judge of Twelfth District, 17 Cal. 547; People v. Clerk of Court, 22 Colo. 280, 44 Pac. 506; Ex parte Chambers, 10 Mo. App. 240; State v. Clayton, 34 Mo. App. 563. See, also, High on Extraordinary Legal Remedies, 4th ed., sec. 172, and 4 Ency. of Pl. & Pr. 442, 443, 492."

In State v. Superior Court, ante, p. 915, 82 Pac. 875, just decided, this court entertained jurisdiction of an application for a writ of mandamus to compel the court to proceed with a garnishment proceeding in which it had granted a change

of venue. But in that case we could not presume that the court to which the proceeding was transferred would take jurisdiction, if in fact it had none, and furthermore, the error there complained of could never be corrected by an appeal from the court in which the error was committed. We therefore held that there was no adequate remedy by appeal.

It is the general policy of our law that cases shall come to 559 this court but once, and that the decision of this court shall be based on the merits of the entire controversy. The question here presented is no exception to this rule. There are additional reasons why applications of this kind should not be favored. Such applications are usually submitted in an informal manner, without adequate briefs, and often without an appearance by the adverse party. Such practice is not conducive to a proper consideration, or correct decision, of important questions of law in an appellate court. We again announce the rule that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction; and that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense. There must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary jurisdiction.

We desire to say in conclusion that the court is declaring no new rule at this time. The rule now adhered to has been the established one in this court since the decision in State v. Superior Court, 20 Wash. 502, 55 Pac. 933, and ever since the announcement of that decision the court has uniformly treated the cases cited by the relator as overruled. To avoid further misunderstanding, the cases of State v. Superior Court, 5 Wash. 518, 32 Pac. 457, 771, State v. Superior Court, 7 Wash. 306, 34 Pac. 1103, State v. Superior Court, 9 Wash. 668, 38 Pac. 206, and State v. Superior Court, 15 Wash. 366, 46 Pac. 395, and all other decisions of this court which make the question of the jurisdiction of the court below the sole test of jurisdiction in this court, on applications of this kind, are hereby overruled. The application for the writ is denied.

Mount, C. J., Fullerton, Hadley, Dunbar, Root, and Crow, JJ., concur.

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I. Definitions and Descriptions.

Perhaps no definition of the writ of prohibition can be formulated which will not be, to some extent, at variance with some of the decisions hereinafter to be considered. Bouvier and others have adopted substantially the definition given by Blackstone, declaring that prohibition "is the name of a writ issued by a superior court, directed to the judge and parties to a suit in an inferior court, commanding them to cease from the further prosecution of the same, on a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court": Bouvier's Law Dictionary; Black's Law Dictionary, tit. "Prohibition." "The writ of prohibition is a writ issuing out of a superior court to restrain an inferior court within the limits of its jurisdiction. It is granted in all cases where the inferior court exceeds its powers either by acting where it has no jurisdiction, or where, having a primary jurisdiction, it takes upon itself the decision of something not within its jurisdiction": Rapalje & Lawrences's Law Dictionary, tit. "Prohibition."

In some of the states definitions have been formulated and adopted which, on their face, appear to extend the scope of the writ. Thus, section 1102 of the Code of Civil Procedure of California declares that, "the writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Such a definition involves a contradiction in terms. The words "jurisdiction" and "ministerial" necessarily relate to different tribunals or persons. Strictly speaking, we do not understand that there can be jurisdiction to exercise a ministerial function. Wherever jurisdiction is exercised, the function is necessarily judicial or quasi judicial, and we doubt whether the section could have been construed as authorizing the prohibition of an attempted exercise of purely ministerial functions, even if it had not been declared unconstitutional when so construed.

Perhaps the most correct definition of the writ and description of its purposes contained in any single decision may be found in State v. Ward, 70 Minn. 58, 72 N. W. 825, as follows: "The object of this writ is to prevent an inferior tribunal from usurping a jurisdiction with which it is not legally vested, or, to put it in another form, it issues only to restrain the acts of an inferior tribunal exercising some judicial power which it has no legal authority to exercise at all. A writ of prohibition is an extraordinary writ issuing

out of a court of superior jurisdiction, and directed to an inferior court or some other inferior tribunal exercising some judicial or quasi judicial power, commanding it to cease entertaining jurisdiction of a cause or proceeding over which it has no control, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers and transgresses the bounds prescribed to it by law.''

The authorities all agree that prohibition is a common-law writ: Ex parte Ray, 45 Ala. 15; Sherlock v. Jacksonville, 17 Fla. 93; Arnold v. Shields, 5 Dana, 18, 30 Am. Dec. 669; Planters' Ins. Co. v. Cramer, 47 Miss. 200; Steele v. State, 1 Tex. Civ. App. 294, 20 S. W. 946; that it is a civil remedy: Planters' Ins. Co. v. Cramer, 47 Miss. 200; City of Memphis v. Halsey, 12 Heisk. 210; Mayo v. James, 12 Gratt. 17; State v. Evans, 88 Wis. 255, 60 N. W. 433; Farnsworth v. Montana, 129 U. S. 104, 9 Sup. Ct. Rep. 253, 32 L. ed. 616; of a preventive rather than of a remedial nature: Ex parte Roundtree, 51 Ala. 42; Coker v. Superior Court, 58 Cal. 177; Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460; Valentine v. Police Court, 141 Cal. 615, 75 Pac. 334; State v. Burckhartt, 87 Mo. 533; Thompson v. Tracy, 60 N. Y. 31; State v. Stackhouse, 14 S. C. 417; People v. Carrington, 5 Utah, 531, 17 Pac. 735; that those states which have adopted the common law have thereby included so much of that law as relates to and authorizes the writ: Arnold v. Shields, 5 Dana, 18, 30 Am. Dec. 669; Ex parte Davis, 41 Me. 38; Planters' Ins. Co. v. Cramer, 47 Miss. 200; that the provisions in their constitutions authorizing the issuing of the writ are restricted to it as it existed at the common law, and hence that the function of the writ cannot be enlarged by the statute so as to extend prohibition to acts of a ministerial character not savoring of judicial or quasi judicial action: Maurer v. Mitchell, 53 Cal. 289; Camron v. Kenfield, 57 Cal. 550; Stein v. Morrison, 9 Idaho, 426, 75 Pac. 246; State v. Hogan, 24 Mont. 379, 62 Pac. 493, 51 L. R. A. 958; Dobson v. Westheimer, 5 Wyo. 34, 36 Pac. 626.

Writs of prohibition differ from injunctions in those cases in which both are employed to prevent further judicial action, in that the former are directed to the parties to the action or other proceeding for the purpose of enjoining them from instituting or taking some further proceedings therein, while the latter, though it is sometimes addressed to parties, is always directed to and against the court, and operates directly upon it, preventing it from entering upon a jurisdiction which it is not competent to exercise or from committing an excess in the exercise of the jurisdiction possessed by it: Mealing v. Augusta, Dud. 221; People v. Circuit Court, 169 Ill. 201, 48 N. E. 717; State v. Whitaker, 114 N. C. 818, 19 S. E. 376; State v. Superior Court, 13 Wash. 226, 43 Pac. 43. Statutes and decisions describing the writ of prohibition as a counterpart of the writ of mandate are misleading: Coronado v. San Diego, 97 Cal. 440, 32 Pac. 518. The latter may be regarded as a counterpart of the former in so

far as the one arrests and the other compels action: State v. Judge, 4 Rob. (La.) 48; Gresham v. Ewell, 84 Va. 784, 6 S. E. 134; but while both may, in proper cases, be addressed to judicial tribunals, the one must always be directed to them, and the other is but rarely so employed, being generally addressed to boards and tribunals whose authority is clearly neither judicial nor quasi judicial.

II. The Courts Which may Issue.

a. By the Common Law.—It is claimed that, in the first instance, writs of prohibition issued out of chancery only, and that proceedings did not take place thereunder in any of the courts of law until after the issue of such writ in chancery, and the parties to whom it was addressed could be deemed in contempt thereof: Note to Croucher v. Collins, 1 Saund. 136; Planters' Ins. Co. v. Cramer, 47 Miss. 200. Whether this is true or not, the more modern practice confined this writ to the common-law courts whenever they were competent to act, and the writ would not be issued by a court of chancery unless on account of their being in vacation the courts of law were unable to act: In re Bateman, L. R. 9 Eq. 666; In re Foster, 24 Beav. 428. Of the courts of England the king's bench seems to have been the first to employ the writ, but it was subsequently issued by the courts of common pleas and exchequer as well: State v. Rombauer, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502; Lincoln L. M. Co. v. District Court, 7 N. Mex. 486, 38 Pac. 580; Jackson v. Maxwell, 5 Rand. 636; The Queen v. Justices, [1894] 1 Q. B. 453.

b. In the United States.

1. The General Principle Controlling.—By virtue of the adoption of the common law, the rule must prevail in each of the American states adopting such law that the writ of prohibition can never issue from one court to another of equal rank: Steele v. State, 1 Tex. Civ. App. 495, 20 S. W. 946; and that, on the other hand, unless restricted by the constitution or some valid legislative enactment, every court possessing general common-law jurisdiction may issue this writ to any inferior court or tribunal: Ex parte Ray, 45 Ala. 15; Bellevue W. Co. v. Stockslager, 4 Idaho, 636, 43 Pac. 568; Price v. State, 8 Gill, 295; State v. Benton, 12 Mont. 66, 29 Pac. 425; Jackson v. Maxwell, 5 Rand. 636; Idaho Rev. Stats., secs. 4994, 4995.

Respecting the power of the chancery courts to issue the writ, we have observed little or no discussion. Such suggestions as have been made regarding it indicate that the writ is regarded as legal in its nature, and therefore, as being restricted to courts of law, so that it is said that if a court has authority to exercise jurisdiction both at law and in equity, and an apparent cause for the employment of this writ is presented to it, it should proceed under its common-law and not under its chancery powers: Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. Rep. 570, 29 L. ed. 601.

2. Constitutional and Statutory Provisions Affecting.—Where the grant of jurisdiction is by the constitution of a state or by any statute not conflicting with it, and purports to declare what courts may issue the writ, such grant is necessarily controlling. We shall not here undertake to collate, or treat in detail, any of these grants, but shall consider them only in the most general way, as it has never been within the professed objects of this series of reports to attend to purely local laws and questions. In a majority of the states their supreme appellate courts have been either in express terms or by clear implication granted the authority to issue these writs: Ex parte Greene, 29 Ala. 52; People v. District Court, 26 Colo. 386, 48 Pac. 604, 46 L. R. A. 850; Singer Mfg. Co. v. Spratt, 20 Fla. 122; Bellevue W. Co. v. Stockslager, 4 Idaho, 36, 43 Pac. 568; Hindman v. Toney, 97 Ky. 413, 30 S. W. 1006; State v. Judge, 45 La. Ann. 532, 12 South. 941; Harriman v. Waldo County, 53 Me. 83; Jacquith v. Fuller, 167 Mass. 123, 45 N. E. 54; State v. Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; State v. Benton, 12 Mont. 66, 29 Pac. 425; State v. Hogan, 24 Mont. 379, 62 Pac. 493, 51 L. R. A. 958; Low v. Crown Point M. Co., 2 Nev. 75; Lincoln L. M. Co. v. District Court, 7 N. Mex. 486, 38 Pac. 580; People v. Court of Common Pleas, 43 Barb. 278; State v. Whitaker, 114 N. C. 818, 19 S. E. 376; Hunter v. Moore, 39 S. C. 394, 17 S. E. 797; People v. Spies, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509; Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36, 25 L. R. A. 605; Commonwealth v. Latham, 85 Va. 632, 18 S. E. 488; State v. Superior Court, 12 Wash. 677, 42 Pac. 123; Fleming v. Commissioners, 31 W. Va. 608, 8 S. E. 267; State v. Gary, 33 Wis. 93; Dobson v. Westheimer, 5 Wyo. 34, 36 Pac. 626. This authority is not, however, implied from a mere grant of appellate jurisdiction, for if nothing beyond such jurisdiction is conferred, then the appellate court has no power to issue the writ as an original proceeding: Ex parte Russell, 29 Ala. 717; Miller v. Wheeler, 33 Neb. 765, 51 N. W. 137; City of Memphis v. Halsey, 12 Heisk. 210; unless in aid of its appellate jurisdiction: Ex parte Hamilton, 51 Ala. 62; People v. Circuit Court, 169 Ill. 201, 48 N. E. 717; People v. Circuit Court, 173 Ill. 272, 50 N. E. 928; Sassen v. Hammond, 18 B. Mon. 672; State v. Parish Judge, 22 La. Ann. 61; State v. Judge, 45 La. Ann. 522, 12 South. 941; State v. Hall, 47 Neb. 579, 66 N. W. 642. In a few of the states the jurisdiction is restricted to the supreme court, or, in other words, to their highest appellate tribunal: State v. Judge, 45 La. Ann. 532, 12 South. 941; Tapia v. Martinez, 4 N. Mex. 165, 16 Pac. 272; Perry v. Shepherd, 73 N. C. 83; State v. Whitaker, 114 N. C. 818, 19 S. E. 376. Where, as in many of the states, their supreme courts and certain subordinate tribunals have concurrent authority to issue writs of prohibition, the former rarely act, unless some special and sufficient reason is disclosed to them why resort has not been had to the subordinate tribunal. This is not because of any want of jurisdiction in the supreme court, but for the

reason that its time would be too much occupied and its attention taken away from other causes more worthy of the exercise of its judicial functions if it were to undertake the exercise of original jurisdiction in all applications for writs of prohibition which might be presented to it. These inferior courts bear different names in different states, but where they are of original, common-law jurisdiction, they may issue the writ to any inferior court whenever necessary to prevent it from acting without, or in excess of, its jurisdiction. These courts may issue the writ and proceed to determine all questions and to grant relief resulting therefrom, whether they are styled superior (Cal. Code Civ. Proc., sec. 6, subd. 5; Sherwood v. New England R. Co., 68 Conn. 543, 37 Atl. 388; Doughty v. Walker, 54 Ga. 595; Jackson v. Maxwell, 5 Rand. 636), or district or circuit courts (Ex parte Booth, 64 Ala. 312; Singer Mfg. Co. v. Spratt, 20 Fla. 122; Jasper County v. Spitler, 13 Ind. 235; Pennington v. Woolfolk, 79 Ky. 13; Lexington's Appeal, 96 Ky. 258, 28 S. W. 665; Planters' Ins. Co. v. Cramer, 47 Miss. 200; Howard v. Pierce, 38 Mo. 296; State v. Kirkland, 41 S. C. 29, 19 S. E. 215; Fleming v. Commissioners, 31 W. Va. 608, 8 S. E. 267), or bear any other name which the constitution or any other competent authority has bestowed upon them.

3. The National Courts.—The supreme court of the United States is by statute authorized to issue writs of prohibition to the district courts thereof when proceeding as courts of admiralty or maritime jurisdiction. The writ thus authorized to be issued is the common-law writ, applicable only to prevent the unlawful assumption of jurisdiction: Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. Rep. 453, 36 L. ed. 232; Ex parte Phoenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. Rep. 25, 30 L. ed. 274; and authority does not appear to exist on the part of the supreme court of the United States to issue this writ to any other court nor in any other cause: Ex parte Christy, 3 How. 292, 11 L. ed. 603; Ex parte Gordon, 1 Black, 503, 17 L. ed. 134; Ex parte Graham, 10 Wall. 541, 19 L. ed. 981; Ex parte Warmouth, 17 Wall. 64, 21 L. ed. 543; Ex parte Gordon, 104 U. S. 515, 26 L. ed. 814; In re Fassett, 142 U. S. 479, 12 Sup. Ct. Rep. 295, 35 L. ed. 1087; Morrison v. District Court, 147 U. S. 14, 13 Sup. Ct. Rep. 246, 37 L. ed. 60. So far as we have ben able to discover, the authority to issue writs of prohibition has never been affirmed or exercised by any of the national courts other than the supreme court in the cases hereinbefore referred to. Section 716 of the Revised Statutes of the United States, which in this respect conforms to section 14 of the judiciary act of 1789, provides that the supreme court, and all circuit and district courts, shall have the power to issue writs of scire facias, and that "they shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and conformable to the usages and principles of law." Still, we have been unable to discover

that any writ of prohibition has been employed with success in any of those courts in the few decisions bearing upon the subject, and probably no case is likely to arise in which the writ will be employed by them: In re Bininger, 7 Blatchf. 159, Fed. Cas. No. 1417.

III. To What Courts and Other Tribunals may Issue.

a. General Rule.—Where the court to which the application is made possesses general common-law jurisdiction to grant writs of prohibition, its writ may be directed to, and must be respected by, any court or judicial tribunal which is inferior in rank to the court issuing the writ: State v. Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; Lincoln L. M. Co. v. First Jud. Dist., 7 N. Mex. 486, 38 Pac. 580; Moore v. Holt, 55 W. Va. 507, 47 S. E. 251; Ex parte Smythe, 2 Cromp. M. & R. 748, 1 Gale, 274; James v. L. & S. W. Ry., L. R. 7 Ex. 287, 27 L. T. 382, 41 L. J. Ex. 186, 21 Week. Rep. 25, Ex. Ch.; High on Extraordinary Legal Remedies, sec. 776. It is not material whether the court sought to be controlled is of legal or equitable jurisdiction, for while, as we have already shown, courts of chancery do not possess, or, if they possess, prefer not to exercise, the power of issuing the writ, there is no doubt that their proceedings are subject to it: Ex parte Lyon, 60 Ala. 650; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561; State v. Voorhies, 40 La. Ann. 1, 3 South. 460; St. Louis etc. R. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; State v. Superior Court, 12 Wash. 677, 42 Pac. 123. Neither is it material that the proceeding sought to be arrested consists of, or arises out of, a prosecution for crime, provided the court to which the writ issues is subordinate to the court issuing it, and the matter complained of is not a mere error or irregularity, but amounts to a want of jurisdiction or to an act in excess of it: Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341; Terrill v. Superior Court (Cal.), 60 Pac. 38; Hughes v. Recorder's Court, 75 Mich. 574, 13 Am. St. Rep. 475, 42 N. W. 984, 4 L. R. A. 863; State v. Laughlin, 73 Mo. 443; Zylstra v. Corporation of Charlestown, 1 Bay, 382. The court to which the writ issues may be a court of appellate jurisdiction, for, though authorized to entertain appeals or writs of error, the cases in which it may exercise this authority are necessarily prescribed by the constitution or some other law, and if it undertakes to proceed when it has not acquired jurisdiction by an appropriate appeal or writ of error, or when such jurisdiction having been properly acquired, it undertakes to do some act in excess thereof or tc make some order beyond its authority, its action may be resisted by a writ of prohibition issued by some court of competent jurisdiction: McConky v. Superior Court, 56 Cal. 83; Coker v. Superior Court, 58 Cal. 177; Rickey v. Superior Court, 59 Cal. 661; Gray v. Superior Court, 61 Cal. 337; Hindman v. Toney, 97 Ky. 413, 30 S. W. 1006; Chandler v. Railroad Commrs., 141 Mass. 208, 5 N. E.

509; Darby v. Cosens, 17 R. I. 552; State v. Superior Court, 17 Wash. 54, 48 Pac. 733; State v. Superior Court, 17 Wash. 564, 50 Pac. 482; State v. Superior Court, 20 Wash. 709, 54 Pac. 937; County Court v. Armstrong, 34 W. Va. 326, 12 S. E. 488.

Respecting the power of the civil courts to issue writs of prohibition to courts-martial we are left in some doubt. That these courts are judicial tribunals whose sentences will, when duly approved, protect parties acting under them in those cases in which they have jurisdiction and will leave them without such protection in every case where they have not jurisdiction (Mills v. Martin, 19 Johns. 7; Dynes v. Hoover, 20 How. 625, 15 L. ed. 838; Runkle v. United States, 122 U. S. 543, 7 Sup. Ct. Rep. 1141, 30 L. ed. 1167; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281), we cannot doubt. Furthermore, they appear to have been subject to writs of prohibition in England (Grant v. Gould, 2 H. Black. 69, 3 Bank. Reg. 342; In re Mansergh, 1 Best & S. 400, 30 L. J. Q. B. 296, 7 Jur., N. S., 825, 14 L. T. 469, 9 Week. Rep. 703), provided the writ was applied for before their sentences were approved and executed: In re Poe, 5 Barn. & Ad. 681, 2 Nev. & M. 636, 3 L. J. K. B. 33. Such discussion on the subject as has taken place in the United States impresses us with the conviction that these tribunals are not to be regarded as inferior and subordinate to the civil courts, so as to enable the latter to arrest their action upon the ground of their want of, or their proceeding in excess of, jurisdiction, and that where the jurisdiction is absent, the only redress on the part of the person injured is to obtain his liberty by writ of habeas corpus if restrained thereof, or to seek satisfaction by civil action in the event that he has suffered pecuniary injury: United States v. Maney, 61 Fed. 140; United States v. Whitney, 4 Mackey, 535; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. Rep. 1050, 29 L. ed. 277.

The district courts of the United States are subject to writs of prohibition issued from the supreme court thereof where the former are proceeding in the exercise of admiralty or maritime jurisdiction: Ex parte Christy, 3 How. 292, 11 L. ed. 603; Ex parte Gordon, 1 Black, 503, 17 L. ed. 134; Ex parte Warmouth, 84 U. S. 64, 21 L. ed. 543; In re Cooper, 138 U. S. 404, 11 Sup. Ct. Rep. 289, 34 L. ed. 993. But it is doubtful if any other instances can be found in which a writ of this character can issue to or against any court of the United States, though, as hereinbefore shown, all the national courts are expressly given authority to issue the writs necessary to the exercise of their jurisdiction: Subd. II, b, 3.

It is obvious that none of the state courts can be subject to a writ of prohibition emanating from a court of any other state or sovereignty, and that in the sense in which these terms are here employed, the courts of the United States must be regarded as of another sovereignty, or, at least, as not of that superior jurisdiction which enables them to issue a writ of prohibition to a state court unless it be under the grant to the national courts of the

power to issue that writ in all cases necessary to the exercise of their jurisdiction. As yet, no instance has been found in which a national court has undertaken to prohibit action by a state court, and it is not likely that one will be discovered: Rogers v. Cincinnati, 5 McLean, 337, Fed. Cas. No. 12,008; In re Bininger, 7 Blatchf. 159, Fed. Cas. No. 1417. It would seem clear that prohibition cannot issue from a state court to arrest or prevent action in a court of the United States. Such writ may, however, become necessary and proper in aid of the jurisdiction of a court of the United States, as where a state court has by injunction attempted to restrain a party from prosecuting proceedings in a national court, in which case, if the action of the state court is beyond its authority, a writ of prohibition may issue to it from another court of the same state but of superior jurisdiction: People v. Judge (Mich.), 2 N. W. 919.

It seems superfluous to attempt to enumerate all the numerous courts which are confessedly judicial tribunals to which writs of prohibition may issue. Justices of the peace (Hayne v. Justice's Court, 82 Cal. 284, 16 Am. St. Rep. 114, 23 Pac. 125; State v. McCrae, 40 La. Ann. 20, 3 South. 380; Yearian v. Speirs, 4 Utah, 482, 11 Pac. 618; Bodley v. Archibald, 33 W. Va. 229, 10 S. E. 392) and probate courts (State v. Probate Court, 19 Minn. 117; State v. Mitchell, 2 Bail. 225) constitute familiar examples. The fact that the tribunal against which the writ is issued is or is not in name a court is not conclusive of the right to issue the writ against it, though it is conceded to be acting without or in excess of authority. Though it is a court, the action in question may not be judicial, and though it is clearly not a court in the ordinary acceptation of the term, such action may be judicial in its nature, and therefore, in the one case the writ must be denied, though the tribunal against which it is sought is by law denominated a court, and in the other the writ must be granted, though the tribunal is nowhere spoken of as a court.

b. Courts in the Exercise of Ministerial Authority.—One of the tests for determining whether an attempted exercise of authority may be arrested by aid of the writ of prohibition is to inquire whether the act is ministerial or judicial in its nature. For example, except in those cases where some valid constitutional enactment declares directly to the contrary, it must appear that the act in question is not ministerial in character. If it is ministerial, the writ cannot be sustained, though the person or tribunal against which it is sought is a judge or court authorized in proper cases to discharge judicial functions: State v. Clark County Court Justices, 41 Mo. 44; Hockaday v. Newsome, 48 Mo. 196; Dobson v. Westheimer, 5 Wyo. 34, 36 Pac. 626. Hence, a writ of prohibition will not issue to prevent a judge from certifying the costs of conviction in a criminal case (In re Pierce, 89 Ala. 177, 8 South. 74);

or entering a fieri facias against a party (State v. Houston, 35 La. Ann. 236; State v. Houston, 35 La. Ann. 538; Ex parte Braudlacht, 2 Hill, 376, 38 Am. Dec. 593); or taking testimony in a contested election (State v. Peers, 33 Minn. 81, 21 N. W. 860); or appointing an officer in place of one he has removed (State v. Laughlin, 7 Mo. App. 529); or directing the clerk of the court to issue a certificate of the incorporation of a town (Bloxton v. McWhorter, 46 W. Va. 32, 32 S. E. 1004); or indorsing an order for an election on a petition therefor in a form prescribed by statute (State v. Bradley, 134 Ala. 549, 33 South. 339).

c. Courts in the Exercise of Legislative Authority.—Prohibition will not issue to a tribunal strictly legislative in its functions. Nor is it essential to the application of the rule that the tribunal should bear a name indicating its legislative capacity. On the contrary, it may bear the name of a court, and the functions usually exercised by it may be strictly judicial. An inquiry is, therefore, always permissible respecting the actual character of the act or proceeding sought to be prohibited, and if such character is found to be legislative, the writ must be refused, though the tribunal against which it is sought is a court. Therefore, a writ of prohibition will not issue against the fixing of water rates (Spring Valley Waterworks v. Bartlett, 63 Cal. 245); or the investigation of charges against a public officer with a view of his removal from office, in those cases in which he is not entitled to a hearing (People v. Lake County Dist. Court, 6 Colo. 534; Lodge v. Fletcher, 184 Mass. 238, 68 N. E. 204); or the granting or refusing of a license for the sale of intoxicating liquors (La Croix v. Fairfield County Commrs., 49 Conn. 591; State v. Burckhartt, 87 Mo. 533; State v. City of Columbia, 16 S. C. 412; Virginia P. C. Co. v. McDowell (W. Va.), 5 S. E. 1); or the hearing and determination of an election contest where the tribunal acting must be regarded, under the law, as a mere representative of the legislature itself and as an instrumentality created or employed by it for making the investigation and taking the action which it might itself have made or taken in the exercise of its authority to hear and determine the contest in question: McWhorter v. Dorr, 57 W. Va. 608, 110 Am. St. Rep. 815, 50 S. E. 838.

d. Officers of the Court.—In many instances, officers of the court exercise a judicial or quasi judicial authority and are authorized to make inquiry respecting facts, to draw conclusions from such inquiry, and to take action thereon apparently judicial in character. In such cases the question must arise whether their action, if in excess of their authority, can be arrested by writs of prohibition, or controlled only by some other proceeding addressed to the court which they represent. In United States v. Berry, 2 McCrary, 58, 4 Fed. 779, in which it was claimed that a United States commissioner acting as an examining magistrate had incorrectly found,

and was proceeding on the assumption, that a crime had been committed within the sole jurisdiction of the United States, and that this finding was without authority, and that a writ of prohibition should issue arresting further proceedings by such commissioner, so that the state might prosecute in its courts against the alleged criminals, it was held that the commissioner was an officer of the court merely, and exercised none but ministerial functions, and that prohibition would not be allowed against him. In Massachusetts, on the other hand, where a master in chancery was about to proceed to entertain an application of a debtor to take the oath for the relief of poor debtors, that he did not intend to leave the state, and the statute provided that if the magistrate taking such oath was satisfied that the defendant had not when arrested intended to leave the state, he should make a certificate thereof and discharge the debtor from arrest, it was held that the commissioner might be prohibited where he was without authority: Henshaw v. Cotton, 127 Mass. 60. The difference between the two cases consists in the fact that in the proceeding in the state court the magistrate must assume to make inquiry and pronounce judgment or finding thereon, the immediate result of which must be the discharge of the debtor from arrest, and he, therefore, clearly exercised the jurisdiction of a subordinate judicial tribunal.

e. **De Facto Officers and Tribunals and Persons and Tribunals Possessing No Authority.**—In Ex parte Roundtree, 51 Ala. 42, a writ of prohibition issued to a judge to prevent him from acting as the presiding officer of an inferior court, as provided by an act of the legislature, on the ground that such act was unconstitutional, and his action as such presiding judge, therefore, entirely beyond his jurisdiction. This was an indirect way of testing the constitutionality of the statute and incidentally the right of the officers of the inferior court to act. Nevertheless, the proceeding was addressed to one confessedly an officer of another tribunal having jurisdiction to act as such, and the act which he contemplated performing was in excess of his jurisdiction. We do not think that this decision can be regarded as supporting the view that prohibition, even when directed against persons acting as judges or other judicial officers, can be treated as a substitute for quo warranto or be rightfully called upon to perform any of the functions of that writ. If there is a court, judge or officer de facto, the title to the office and the right to act cannot be questioned by prohibition: State v. McMartin, 42 Minn. 30, 43 N. W. 572; State v. Allen, 24 N. C. 183; Koury v. Castillo (N. Mex.), 79 Pac. 293; Fleming v. Commissioners, 31 W. Va. 608, 8 S. E. 267; Board of Education v. Holt, 54 W. Va. 167, 46 S. E. 134. If an intruder takes possession of a judicial office, the person dispossessed cannot obtain relief through a writ of prohibition commanding the

alleged intruder to cease from performing judicial acts: Buckner v. Veuve, 63 Cal. 304. "In its very nature prohibition is an improper proceeding by which to determine the title to an office. If it could go against a person in office, the writ would ipso facto stop the exercise of the functions of the office before an adjudication of the right of the defendant to hold it. If awarded against a person out of office, to prevent him from assuming its duties, its effect would be, in some instances, to leave the office vacant pending the controversy. Thus, the efficiency of the public service would be impaired and the state left without officers to execute the laws. Everything would be within the power of the courts": Moore v. Holt, 55 W. Va. 507, 47 S. E. 251. Therefore, the writ will not issue to prevent a person who claims to have been elected to an office from assuming and exercising its duties, on the ground that he was ineligible to such election, and a judge who assumes to award the writ of prohibition in such a case will himself be prohibited by a superior court from further exercising jurisdiction in the matter of such prohibition: Moore v. Holt, 55 W. Va. 507, 47 S. E. 251. Nor will the writ of prohibition issue against a judge de facto on the ground that the statute purporting to confer authority upon the governor to appoint him is unconstitutional: Walcott v. Wells, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367, 9 L. R. A. 59.

We may readily suppose a case in which a person or board having no judicial functions whatever assumes to discharge them and to make some order or proceed with some investigation or determination which, if authorized, must be judicial in character and consequences. The determination is necessarily void. In that consequence, however, it does not differ from a void judgment, even when pronounced by a judicial tribunal authorized to make investigations and pronounce judgments thereon in matters falling within its jurisdiction. It has been held, in England, that usurpation of jurisdiction of a judicial character by a board having no judicial functions may be prohibited: Ex parte Kingstown Commrs., L. R. 18 I. R. 509, C. A. We apprehend that this decision cannot be sustained in the United States, and that if a private person, or board of persons, or a board having, under no circumstances, any judicial authority should attempt to exercise such authority, that the courts will not interpose by issuing writs of prohibition: Hevren v. Reed, 126 Cal. 219, 58 Pac. 536.

f. Tribunals Exercising Judicial or Quasi Judicial Functions.

1. General Rules Applicable to.—As already suggested, if the action sought to be prohibited is judicial in its nature, it may be prevented by the writ of prohibition, though the tribunal or person to whom the writ is addressed is not in name a court or judge. Doubtless different courts may be unable to agree in defining judicial action or function, or if they agree in their definitions,

may not be able to harmoniously apply them in the multitude of cases presented for determination. Without undertaking to formulate definitions respecting a matter which is probably easier understood than defined, we shall proceed to give illustrations of the application of the rule that prohibition will issue when the unauthorized act is judicial in its nature, and will not issue when it is ministerial only.

2. Instances in Which the Writ has been Granted Because the Act was Judicial or Denied Because It was Ministerial.

A. Boards Usually Exercising Functions of a Ministerial or Legislative Character.—County commissioners, boards of supervisors, city councils, police, excise and highway commissioners, and boards exercising functions similar in character sometimes undertake, either with or without authority, to perform acts in the doing of which they clearly exercise, or attempt to exercise, jurisdiction of a judicial nature. Hence if county commissions or boards of supervisors are about to assess damages for the taking of property, or to fix a disputed boundary between two towns, and in so doing are proceeding without or in excess of their jurisdiction, prohibition will issue against them: Vermont etc. R. Co. v. Franklin Co. Commrs., 64 Mass. 12; Connecticut River R. Co. v. Franklin Co. Commrs., 127 Mass. 50, 34 Am. Rep. 338; People v. Albany Co. Suprs., 63 How. Pr. 411. The result must be otherwise when they are acting in their ministerial or legislative capacity: La Croix v. Fairfield Co. Commrs., 49 Conn. 591. The same principles are applicable to city councils (Mealing v. City Council of Augusta, Dud. 221; Hunter v. Moore, 39 S. C. 394, 17 S. E. 797), and other municipal bodies, such as boards of education (Board of Education v. Holt, 51 W. Va. 435, 41 S. E. 337; Hassinger v. Holt, 47 W. Va. 348, 34 S. E. 728), excise commissioners (Lacroix v. Fairfield County Commrs., 50 Conn. 321, 47 Am. Rep. 648; Higgins v. Talty, 157 Mo. 280, 57 S. W. 724; Town of Hawk's Nest v. County Court, 55 W. Va. 689, 48 S. E. 205), commissioners for laying out streets (Lindsay v. East Bay Street Commrs., 2 Bay, 38), except where they insist on acting in defiance of the judgment of a court of competent jurisdiction (Harriman v. Waldo County, 53 Me. 83), and police commissioners (State v. Police Commrs., 16 Mo. App. 48; Norton v. Dowling, 46 How. Pr. 7), unless it appears that the function in question is under the peculiar circumstances of the case and the law applicable thereto judicial.

B. Individual Officers, whether county, municipal, state or national, are necessarily exempt from this writ in all cases where their action is ministerial. Hence, it will not be issued to prevent the payment of a reward offered by a mayor without authority (Patton v. Stephens, 14 Bush, 324); nor the issuing of a warrant on the state treasury by the controller (Camron v. Kenfield, 57 Cal. 550); nor the issuing by the governor of a commission to a sheriff

on the ground that he has been improperly elected (Greir v. Taylor, 4 McCord, 206, 17 Am. Dec. 739); nor the examination by the county attorney of the condition of insurance companies (Home Ins. Co. v. Flint, 13 Minn. 244); nor the certifying by the Secretary of State to the county auditor of a ticket not entitled to be certified (Williams v. Lewis, 6 Idaho, 184, 54 Pac. 619); nor a proceeding by the state auditor by distress against an alleged defaulting collector and his sureties (Casby v. Thompson, 42 Mo. 133). Whether prohibition will issue against a coroner depends on whether the act in question is judicial or nonjudicial. In England, it may issue to prevent his holding an inquest when he is not authorized to do so: Regina v. Herford, 3 L. & L. 115, 29 L. J. Q. B. 249, 6 Jur., N. S., 750, 2 L. T. 459, 8 Week. Rep. 579.

C. Referees and Arbitrators.—The action of referees and arbitrators may be considered to be judicial in character, and instances have occurred of writs of prohibition issuing against them: School Dist. No. 6 v. Burris, 84 Mo. App. 654; State v. Stackhouse, 14 S. C. 417. We infer, however, that the writ must generally be denied on the ground that some other remedy exists equally or more speedy and adequate, as by application to the court appointing them.

D. Proceedings Relating to the Election or Removal of Officers. Generally, officers of election and election commissioners having the supervision of elections are deemed ministerial in their functions, and hence not subject to the writ of prohibition respecting acts done in ordering and preparing for elections: People v. San Francisco Election Commrs., 54 Cal. 404; Kemp v. Ventulett, 58 Ga. 419; Lemon v. Peyton, 64 Miss. 161, 8 South. 235; and even in ascertaining and pronouncing the result: Seymour v. Almond, 75 Ga. 112. This view, in so far as it relates to canvassing the votes and declaring the result, does not prevail in several of the states: State v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; Brown v. Board of Election Commrs., 45 W. Va. 826, 32 S. E. 168; Brazie v. Fayette County Commrs., 25 W. Va. 213.

An officer or board is in many instances authorized to remove another officer for some specified cause. Where such is the case, it is now well settled that the proceeding for the removal is of a judicial nature and subject to review by the courts: State v. Common Council, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; People v. Cooper, 57 How. Pr. 416; Mechem on Public Officers, secs. 455, 456; Throop on Public Officers, sec. 379. There are decisions not in conformity with these views, and which, therefore, hold that the writ of prohibition will not issue against the removing authority when acting without or in excess of its jurisdiction: People v. Lake City Dist. Court, 6 Colo. 534; Burch v. Hardwicke, 23 Gratt. 51. As, however, it appears to be no longer questioned that the authority is judicial, and therefore subject to review in the

courts, there is no reason for denying the writ of prohibition when the body attempting to remove the officers acts without authority; Speed v. Common Council, 98 Mich. 360, 39 Am. St. Rep. 555, 57 N. W. 406, 22 L. R. A. 842; and if the writ can be denied, it must be on the ground that resort must be had to certiorari or some other adequate remedy. A county school superintendent served a notice on a teacher in the common schools of the county, declaring that it appeared to the superintendent that the teacher was chargeable with giving unlawful assistance to a person under examination respecting his competency as teacher, and that the person to whom the notice was addressed must appear and show cause why his certificate should not be revoked. The latter thereupon applied for a writ of prohibition against the proposed action on the ground that the superintendent had not jurisdiction to revoke the certificate for the cause specified in the citation. The court of appeals of the state had no doubt of the propriety of granting the writ unless it could be shown that the superintendent had authority to proceed on the ground specified by him, and no such ground being shown, the judgment of the trial court granting the writ was affirmed: Superintendent of Common Schools v. Taylor, 105 Ky. 387, 49 S. W. 38.

E. To Prevent Assessments or the Levy and Enforcement of Taxes.—To us it appears that the making of assessments, the levying of taxes (Coronado v. City of San Diego, 97 Cal. 440, 32 Pac. 518; Cody v. Lennard, 45 Ga. 85), and proceedings for their collection (Le Conte v. Town of Berkeley, 57 Cal. 269; Farmers' etc. Union v. Thresher, 62 Cal. 407; Hobart v. Tilson, 66 Cal. 210, 5 Pac. 831), are in no sense judicial acts, but, on the contrary, are either legislative or ministerial, and not to be prevented by writs of prohibition, and so the authorities cited above declare. On the other hand, in several states, this remedy has been employed with success. Generally, its appropriateness has been assumed, and therefore it is difficult, if not impossible, to understand on what grounds the courts proceeded. In Arkansas, prohibition was sustained where it was claimed that a tax was illegally levied, apparently on the ground that the levy was made by a county court, and that, as no other method had been provided by law for questioning its action, one must be found in the supervising control and appellate jurisdiction of the circuit courts over the county court: Floyd v. Gilbreath, 27 Ark. 675. Under the charter of the city of Louisville, in Kentucky, this remedy was expressly authorized by charter: Talbot v. Dent, 9 B. Mon. 526. It has also been held to exist in New York, but without any statement of the law or reason upon which the court acted: People v. Works, 7 Wend. 486; People v. Schoharie County, 121 N. Y. 345, 24 N. E. 830; and apparently in opposition to a well-considered case upon the same subject: People v. Supervisors of Queens County, 1 Hill, 195. In South Carolina, the writ formerly issued, and perhaps still issues, to pre-

vent the collection of a tax on the ground that the officer was not authorized to impose double taxes, and apparently also for defects in the tax execution: State v. Graham, 2 Hill, 457.

IV. Grounds for Issuing.

a. Want of Jurisdiction.

1. General Rule.—That a court has no jurisdiction of an action or proceeding before it, or though it has general jurisdiction thereof, that it has not jurisdiction to do the act complained of, is always a sufficient ground for the issuing of a writ of prohibition: Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. Rep. 25, 30 L. ed. 274; unless some special reason exists for refusing, hereinafter referred to in subdivision V.

2. Original Want of Jurisdiction of the Subject Matter.—If a court has not original jurisdiction of the subject matter of the action or proceeding, whatever judgment or order it may make therein is void, and while the party against whom it purports to act to a certain extent has a remedy by refusing to yield any obedience with respect to it, and often by resort to some appellate tribunal, nevertheless the unauthorized action will be arrested on proper application for a writ of prohibition (Lincoln L. M. Co. v. District Court, 7 N. Mex. 486, 38 Pac. 580; Yearian v. Spiers, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509); as where the court undertakes to entertain an action for real property situate beyond its territorial jurisdiction (Grangers' Bank v. Superior Court (Cal.), 33 Pac. 1095); or in a cause otherwise without its jurisdiction (South Carolina R. R. Co. v. Ells, 40 Ga. 87; State v. Newman, 49 La. Ann. 52, 21 South. 189; Henshaw v. Cotton, 127 Mass. 60; State v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; Board of Supervisors v. Gorrell, 20 Gratt. 484; Miller v. Marshall, 1 Va. Cas. 158; United States v. Peters, 3 Dall. 121, 1 L. ed. 535); or under a statute which, because of its unconstitutionality, cannot confer any authority to act (Pennington v. Woolfolk, 79 Ky. 13; Sweet v. Hulbert, 51 Barb. 312); or where the authority to act is clearly exclusively conferred on another court (Russell v. Jacoway, 33 Ark. 191; People v. Placer County Judge, 27 Cal. 151); or where the court undertakes to exercise appellate jurisdiction, and such jurisdiction has not been conferred by law or, if conferred, the proceedings necessary to invoke it have not been taken: Rickey v. Superior Court, 59 Cal. 661; People v. Tompkin's General Sessions, 19 Wend. 154. In Washington, a somewhat different position is taken, to the effect that the supreme court will not prohibit the superior court from taking cognizance of an appeal where the amount in dispute is less than two hundred dollars, though the allegations of the complaint show that court to have been without jurisdiction if the supreme court has no appellate jurisdiction where the amount involved is less than two hundred dollars: State v. Superior Court, 31 Wash. 96, 71 Pac. 722. The general rule is, that where the jurisdiction of the court

is dependent on the amount in controversy, in causes involving either a larger or smaller amount than that of which the court is authorized to take jurisdiction, is as clearly beyond its authority as if the case were one the subject matter of which in every respect was beyond its cognizance: State v. Judges, 40 La. Ann. 771, 5 South. 114; Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36, 25 L. R. A. 605; Hutson v. Lowry, 2 Va. Cas. 42; James v. Stokes, 77 Va. 225.

3. **Dependent on the Time and Place of Action.**—Courts and judicial officers are often denied the power of action except at designated times or places. Thus, at the common law, a court could not act in vacation nor sit at a place other than that prescribed by law. Whenever a court undertakes to act at a place without the limits of its jurisdiction, or in vacation, or otherwise at a time or place when or where it is without authority to discharge judicial functions, the contemplated action may be prevented by a writ of prohibition: Ex parte Branch, 63 Ala. 383; Hudson v. Tooth, 3 Q. B. D. 46, 47 L. J. Q. B. 18, 37 L. T. 462, 26 Week. Rep. 95.

4. **Arising from the Disqualification of the Judge.**—If objection is made to a judge trying a case on the ground that he is disqualified from so doing by reason of his interest, relationship to the parties, or any other sufficient ground for disqualification, and he, nevertheless, is about to proceed, the writ of prohibition will issue to prevent his doing so: North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315; People v. District Court, 26 Colo. 226, 56 Pac. 1115; State v. Judge of Fifteenth District Court, 33 La. Ann. 1293; State v. Judge Twenty-first Judicial District, 37 La. Ann. 253; State v. Judge Third Judicial District, 38 La. Ann. 247; State v. Fort, 178 Mo. 518, 77 S. W. 741; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238.

5. **Want of Jurisdiction of the Person.**—Jurisdiction of the person against whom a judicial proceeding is about to be taken is not less essential than jurisdiction over the subject matter thereof. Hence, we cannot doubt that want of jurisdiction of the person may justify the issuing of a writ of prohibition. There is more difficulty in the application of the rule than when it is claimed that jurisdiction of the subject matter does not exist, for whether such jurisdiction exists or not is easily ascertainable from the record or so easily susceptible of proof that there can be no substantial issue on the subject, whereas the want of jurisdiction over the defendant rarely appears by the record, and when sought to be established, usually requires resort to extrinsic evidence. When an order is made or a judgment entered in an action purporting to affect a person not a party thereto and against whom no process has been issued or served, the want of jurisdiction of his person does not admit of any controversy, and further proceedings against him may be stayed by writ of prohibition: Stuparich M. Co. v. Superior Court, 123 Cal.

290, 55 Pac. 985; People v. Wayne County Judge, 26 Mich. 100; Howard v. Pierce, 38 Mo. 296; State v. Superior Court, 15 Wash. 500, 46 Pac. 1031. Probably the same result follows when the order or judgment is made against a party to the action, and the record clearly shows that he was beyond the jurisdiction of the court and did not voluntarily appear, and that the service of summons upon him was not made within the state. In New York, a defendant was held entitled to a writ of prohibition because the summons was served on him at a time when he was exempt from such service: People v. Inman, 74 Hun, 130, 26 N. Y. Supp. 329. We apprehend that when the service of process is claimed to be illegal or in some respect defective, and even when it is claimed not to have been served at all, the remedy of the defendant is by application to the court issuing the writ, which thereupon has jurisdiction to determine whether it has been so served as to give it jurisdiction, and that any error it may make can rarely, if ever, be avoided by a writ of prohibition: McDonald v. Agnew, 122 Cal. 448, 55 Pac. 125; State v. Malone, 40 Fla. 129, 23 South. 575; State v. Voorhies, 34 La. Ann. 1142; Troegel v. Judge Second City Court, 35 La. Ann. 1164; State v. District Court, 26 Minn. 233, 2 N. W. 698; People v. Putnam County Surrogate's Court, 36 Hun, 218; McConiha v. Guthrie, 21 W. Va. 134. Perhaps it would be more accurate to state that the question whether the defendant has been served with process or otherwise given such notice as entitled the court to exercise jurisdiction over him is likely to present an issue of fact upon which the evidence may be conflicting, and as to that issue, as we shall hereinafter show, prohibition is a proceeding not adapted to its trial because it involves a controverted issue of fact, but when it appears by the record or is practically conceded that process was not served, or that the court was for any other reason without jurisdiction of the person of the defendant, prohibition will issue to prevent its exercising jurisdiction over him either by making orders or pronouncing judgment against him, or enforcing them when once made: Coger v. Coger, 48 W. Va. 135, 35 S. E. 823; Simmons v. Thommasson, 50 W. Va. 656, 41 S. E. 335.

b. Loss of Jurisdiction Once Existing.

1. Generally.—Jurisdiction over the subject matter of an action or the parties thereto, though it has once confessedly attached, may subsequently terminate, and when this happens, the court is as destitute of jurisdiction as if jurisdiction either of the subject matter or of the person had never existed, and if it proposes to take any further action, the writ of prohibition may issue (State v. Williams, 48 Ark. 227, 2 S. W. 643; Wagner v. Superior Court, 100 Cal. 359, 34 Pac. 820; Buckley v. Superior Court, 102 Cal. 6, 41 Am. St. Rep. 135, 36 Pac. 360; Spencer v. Branham, 109 Cal. 336, 41 Pac. 1095; Doughty v. Walker, 54 Ga. 595; Gilbert v. Hebard, 8 Met. 129; State v. Young, 44 Minn. 76, 46 N. W. 204; Burroughs v. Taylor, 90 Va. 55, 17 S. E. 745; State v. Superior Court, 10

Wash. 168, 38 Pac. 998; State v. Superior Court, 19 Wash. 128, 52 Pac. 1013), as where it proposes to take further proceedings after a judgment has become final (State v. Williams, 48 Ark. 227, 2 S. W. 643); or to require a bankrupt to appear for further examination after his discharge (Wagner v. Superior Court, 100 Cal. 359, 34 Pac. 820); or to make an order in insolvency proceedings respecting property which has passed beyond its jurisdiction (State v. Young, 44 Minn. 76, 46 N. W. 204); or to open a default (Spencer v. Branham, 109 Cal. 336, 41 Pac. 1095); vacate a judgment (State v. Superior Court, 19 Wash. 128, 52 Pac. 1013); or grant a new trial (Burroughs v. Taylor, 90 Va. 55, 17 S. E. 745) after the expiration of the time within which the court had authority to take such action. If a new trial is granted where no notice of an intention to apply therefor has been given and no statement thereon has been served or filed within the time prescribed, or in any cause where, for any other reason, the court had not authority to grant it, prohibition will issue to prevent any further proceeding in the matter of such new trial, or dependent thereon: White v. Superior Court, 72 Cal. 475, 14 Pac. 87; Burroughs v. Taylor, 90 Va. 55, 17 S. E. 745.

2. By an Appeal or Writ of Error.—The jurisdiction of a court may also be lost, or at least terminated, by the perfecting of an appeal or writ of error to some other court, accompanied, when necessary, by an undertaking sufficient to stay proceedings until the appellate court has exercised its jurisdiction. All further proceedings dependent upon, or in the way of the enforcement of, the order or judgment whose effect has been thus suspended by the appeal or writ of error are unauthorized and will be prohibited: Livermore v. Campbell, 52 Cal. 75; Covarrubias v. Board of Supervisors, 52 Cal. 622; State I. I. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211; Kilburn v. Law, 111 Cal. 237, 43 Pac. 615; Fite v. Black, 84 Ga. 413, 11 S. E. 782; Gray v. Lowe, 9 La. Ann. 478; State v. Parish Judge, 22 La. Ann. 61; State v. Judge of Eighth District, 24 La. Ann. 600; State v. Superior Court, 28 La. Ann. 143; State v. Lewis, 76 Mo. 370; State v. Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; Cuendet v. Henderson, 166 Mo. 657, 66 S. W. 1079; State v. Superior Court, 6 Wash. 112, 32 Pac. 1072; State v. Superior Court, 10 Wash. 168, 38 Pac. 998; State v. Superior Court, 13 Wash. 638, 43 Pac. 877.

3. By an Application for the Removal of a Cause to Another Court.—A party litigant may be entitled to the removal of his cause to some other court for trial, on filing in the court where it is pending some motion, suggestion, or affidavit in the form and of the substance prescribed by some valid statute. If the application is merely for a change of the place of trial to some other court of the same state or sovereignty, and the motion for the change must be addressed to the court where the cause is pending, any order it may make in denial of the application cannot be disregarded, nor

entitle the party prejudiced thereby to a writ of prohibition: State v. Evans, 184 Mo. 632, 83 S. W. 447. Such was not the construction formerly given to the statutes of Washington upon the subject. In that state, the filing of the notice and affidavit prescribed by the statute for a change of the place of trial was once held to, ipso facto, devest the court in which they were filed of jurisdiction, and any attempt on its part to proceed further was prohibited: State v. Superior Court, 5 Wash. 518, 32 Pac. 457, 771; State v. Stallcup, 11 Wash. 713, 40 Pac. 341. These decisions were long since disregarded and were in express terms overruled by the principal case: State v. Superior Court, 40 Wash. 555, ante, p. 925, 82 Pac. 877.

4. By Removal or Transfer of the Cause.—On the filing in a state court of certain papers required by the laws of the United States, a cause pending therein is removed to the national courts. No affirmative action on the part of the state is required to authorize such removal, nor is it possible for it to prevent the assumption of jurisdiction over the cause by the courts of the United States. The latter, however, are still authorized, if they find the cause is not a proper one for removal, to direct its return to the state court. Hence, it is said that while such action on the part of the national courts remains possible, the jurisdiction of the state court must be regarded as suspended rather than as absolutely terminated, and, therefore, that a writ of prohibition will not issue from the supreme court of the state to compel the court wherein the action was commenced to desist from further proceedings therein: Ex parte Grimball, 61 Ala. 598; Ex parte Mobile etc. R. Co., 63 Ala. 349; Central Pac. R. Co. v. Superior Court, 62 Cal. 618; Southern Pac. R. Co. v. Superior Court, 63 Cal. 607.

c. Because of Acts in Excess of Jurisdiction.

1. Generally.—The fact that an action is, as to its subject matter, within the jurisdiction of the court, and that such of the parties as have not voluntarily appeared therein have been served with process, or, in other words, the full concession that the court or other tribunal has jurisdiction both of the subject matter of the action and of the parties thereto, by no means necessarily sustains, even on collateral assault, every order or judgment entered therein. Of course, the fact that the judgment or order is irregular or erroneous does not make it void nor authorize the granting of a writ of prohibition to prevent its entry or enforcement, provided it may be still held to have been made in the exercise of the jurisdiction conferred by law on the court or tribunal. There are, doubtless, orders and judgments entered in cases over which the court had undoubted jurisdiction which are wholly or partly void, because the court either decided some question which it had no power to decide or granted some relief which it had no power to grant: Note to Morrill v. Morrill, 23 Am. St. Rep. 115; Little v. Evans, 41 Kan. 578, 21 Pac.

630; Bridges v. Clay County Commrs., 57 Miss. 252; Reynolds v. Stockton, 43 N. J. Eq. 211, 3 Am. St. Rep. 305, 10 Atl. 385; Munday v. Vail, 34 N. J. L. 418; People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Seamster v. Blackstock, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36; Anthony v. Kasey, 83 Va. 338, 5 Am. St. Rep. 277, 5 S. E. 176; Miskimins v. Shaver, 8 Wyo. 392, 58 Pac. 411; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Neilsen, Petitioner, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118. It is not within the province of this note to enter into any detailed examination or discussion of the question as to what acts of a court must be deemed in excess of its jurisdiction, and therefore void. It is quite sufficient to say that though the court has in the action jurisdiction of one subject matter, it cannot therein make orders or judgments which will affect another and distinct subject matter, nor adjudge questions which are not within the issues presented by the pleadings, nor make dispositions of moneys or other property not before the court, nor can it grant relief beyond the issues of the pleadings or to an extent or in a mode wholly unauthorized by law. In all these cases in which an act of a court or of a judicial or quasi judicial tribunal must be regarded as so far in excess of its jurisdiction as to be successfully assailed on a collateral assault, it must be that such act can be prevented by prohibition, unless, indeed, the court in which the writ is sought shall be of the opinion that the applicant, though entitled to redress, should have sought it in some other forum. Therefore, prohibition may issue to prevent the wholly unauthorized appointment of a receiver and the taking of any action dependent for its validity on such appointment (Ex parte Smith, 23 Ala. 94; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121; Harrison v. Hebbard, 101 Cal. 152, 35 Pac. 555; People's Home Savings Bank v. Superior Court, 103 Cal. 27, 26 Pac. 1015; Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561); or the staying of proceedings in an action after it has been dismissed by the plaintiff (Murray v. Superior Court, 129 Cal. 628, 62 Pac. 191; Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299; State v. Ellis, 108 La. 521, 32 South. 335; State v. Superior Court, 15 Wash. 668, 55 Am. St. Rep. 907, 47 Pac. 31, 37 L. R. A. 111); or the granting of a new trial after the statute authorizing the grant has been repealed (People v. District Court, 28 Colo. 161, 63 Pac. 321); or the determination of the title to a public office on an application for an injunction (People v. District Court, 29 Colo. 277, 93 Am. St. Rep. 61, 68 Pac. 224); or the granting by the trial court of permission to file a bill of review in a case which had already been determined by the supreme court, where the trial court had no authority to grant such permission without leave of the latter court (State v. White, 40 Fla. 297, 24 South. 160); or the passing by a district court as an appellate court on the constitutionality of a statute or the validity of a tax when jurisdiction to pass on the question was exclusively in the supreme court (State v. Voorhies, 41 La. Ann. 540, 6 South.

821; State v. Lee, 106 La. 400, 31 South. 14); or the enforcement of a rule of court respecting the drawing of jurors which it was without power to adopt (State v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43); or the granting of an injunction where no special circumstances were alleged bringing the case under some recognized head of equity jurisdiction (State v. Woods, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596); or the granting of a new trial on the merits after a conviction and sentence of felony where the court had no power to do so (Appo v. People, 20 N. Y. 531); or removing an administrator on an ex parte application (People v. Sprague, 15 App. Div. 539, 44 N. Y. Supp. 556); or punishing as a contempt an act in contempt of another court, which alone had authority to punish it (People v. Placer County Judge, 27 Cal. 151); or ordering or confirming a donation made out of a county treasury without authority (Yates v. Taylor County Court, 47 W. Va. 376, 35 S. E. 24); or granting a release on habeas corpus of a person held under a charge for murder at a time when the judge granting it was not authorized to act, because, by law, his authority to act existed only while the judges of another court were in the city, and they were in fact in the city at the time when the judge undertook to grant such release: State v. Murphy, 132 Mo. 382, 53 Am. St. Rep. 491, 33 S. W. 1136.

The excess of jurisdiction, or rather the attempt to exercise it, may be presented when the subject matter of the action, or, in other words, the claim to be asserted by it, is of a dual nature and consists of two or more parts, one of which is without and the balance within the jurisdiction of the court, in which case it may be left to exercise the jurisdiction belonging to it and prohibited in so far only as respects the cause beyond its jurisdiction: Wallace v. Allen, L. R. 10 C. P. 607, 44 L. J. C. P: 351, 32 L: T: 830, 23 Week. Rep. 703; Regina v. Westmoreland County Court Judge, 58 L. T. 417, 36 Week. Rep. 477; Mackenoche v. Penzance, 6 App. Cas. 443, 50 L. J. Q. B. 611, 44 L. T. 479, 29 Week. Rep. 633, 45 J. P. 584, H. L. (E.); Carslake v. Mapledoram, 2 Term. Rep. 473.

2. **In Proceedings to Punish Contempts.**—Though the court has power to punish contempts, it is necessarily acting in excess of its jurisdiction if it institutes or entertains proceedings looking to the punishment of acts which are not contempts of its authority, because, if contempts at all, they are contempts of another court punishable solely by it (People v. Placer County Judge, 27 Cal. 151), or are acts which the person sought to be punished had a perfect right to do (State v. Langhorne, 8 Wash. 447, 36 Pac. 438), or which for any other reason are not, as a matter of law, contempts: Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460; Ormont v. Ball, 120 Ga. 916, 48 S. E. 383; State v. Superior Court, 31 Wash. 481, 71 Pac. 1095; State v. Circuit Court, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193, 38 L. R. A. 554. That one in danger of being imprisoned for an act which is not in fact a contempt has not an adequate remedy

by certiorari or appeal is obvious, and it is equally clear that the remedy may be by prohibition. In considering this question, the supreme court of Wisconsin said: "This writ issues only to restrain a court in the exercise of judicial functions outside or beyond its jurisdiction, and when there is no other adequate remedy. Having held that the attempt to punish the publication in question as a contempt was in excess of the jurisdiction of the circuit court, no reason is seen why the writ is not an apt and proper remedy, unless, indeed, there be other adequate remedies. We do not think that in a case like the present, where immediate imprisonment was threatened and about to be inflicted either writ of error or habeas corpus can be said to be an adequate remedy. In either case the trial must have been concluded and sentence imposed before the writ could issue, and in the case of habeas corpus the imprisonment must have actually begun. There certainly is grave doubt whether certiorari would lie in any event. In view of these considerations, it seems certain that neither of the last-named writs would afford an adequate remedy, even conceding that they would be applicable. Prohibition has been used in other jurisdictions in similar cases": State v. Circuit Court, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193, 38 L. R. A. 554. There are, doubtless, cases in which the higher courts will interpose by prohibition to prevent the enforcement by the lower court of its orders, through its power to punish for contempt, when the applicant would be left to his remedy by some other proceeding, were it not for the fact that the court has assumed a hostile attitude and is obviously bent on accomplishing its will. Thus, where the court made an order commanding the issuing of warrants for the payment of stenographer's fees in a case where, as a matter of law, the county was not liable therefor, and sought to enforce such order by proceedings for contempt, and it was apparent that the court would make further orders of like character and seek to enforce them by the same methods, prohibition was directed to issue: State v. Superior Court, 4 Wash. 30, 29 Pac. 764.

It must not, however, be inferred that by applications for writs of prohibition the action of a court seeking to punish for contempt can be reviewed because of any error therein. If the act charged is a contempt, the lower court will not be prohibited from acting, unless it undertakes to impose some penalty not permitted by law: State v. Rightor, 32 La. Ann. 1182; State v. Houston, 35 La. Ann. 1195; People v. Court of Oyer and Terminer, 27 How. Pr. 14. The judgment or order sought to be enforced cannot, on application for prohibition, be assailed on the ground of error on the part of the court not involving and undermining its jurisdiction, nor will the higher court, while proceedings are being conducted in the lower for the purpose of determining whether a contempt has been committed, interpose by prohibition on the assumption that the lower court may find and decide that to be a contempt which is not: State v. Scarritt, 128 Mo. 331, 30 S. W. 1026. Though it is usually

perilous for the persons against whom proceedings are being conducted before a court for alleged contempt in disobeying its order, to take any steps questioning such order or in hostility to it, yet there may be cases where it appears that he has some adequate remedy by motion or otherwise to which he may resort, and if so, the writ of prohibition will not issue in his behalf when he has not exhausted such remedy: Aichele v. Johnson, 30 Colo. 461, 71 Pac. 367; Toomey v. Comley, 72 Conn. 458, 44 Atl. 741.

3. In Criminal Prosecutions.—The rules applicable to criminal prosecutions and to judgments and order made therein when they are assailed on prohibition are the same as in civil cases. If the court has no jurisdiction of the subject matter, it may doubtless be prohibited from proceeding. But, though it has general jurisdiction over the subject matter, or at all events, authority over offenses of the class charged, its jurisdiction may not be legally invoked in the case before it, and therefore it cannot proceed with the trial without acting in excess of its jurisdiction, as where the indictment, though it charges a criminal offense, is itself void, in which event the court may be prohibited from trying it: Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341; Terrill v. Superior Court (Cal.), 60 Pac. 38. Probably, like results follow where the indictment does not charge a public offense, because the statute assuming to create the offense is unconstitutional (State v. Eby, 170 Mo. 497, 71 S. W. 52; Zylstra v. Corporation of City of Charleston, 1 Bay, 382), or a municipal ordinance upon which the prosecution rests is for some reason void: Hughes v. Recorder's Court, 75 Mich. 574, 13 Am. St. Rep. 475, 42 N. W. 984, 4 L. R. A. 863. In United States v. Kimball, 7 App. D. C. 499, it was held that defendants who pleaded not guilty and went to trial could not after conviction and before sentence, obtain a writ of prohibition to prevent the imposition of the sentence on the ground that the court had no jurisdiction, but it occurs to us that this holding is more than questionable. If, however, the court in which the criminal prosecution has been or is being conducted has jurisdiction, then, to the same extent as in civil cases, will writs of prohibition be denied, though the proceedings were erroneous or irregular. Furthermore, the accused must employ such remedies as are available to him by appeal, motion or otherwise, and where these are adequate, cannot fail to avail himself of them and obtain relief by prohibition: Levy v. Wilson, 69 Cal. 105, 10 Pac. 272; Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143; Strouse v. Police Court, 85 Cal. 49, 24 Pac. 747; Turner v. City of Forsyth, 78 Ga. 683, 3 S. E. 649; Standard Oil Co. v. Linn (Ky.), 32 S. W. 932; State v. Third Judicial District, 27 Utah, 336, 75 Pac. 739; State v. Evans, 88 Wis. 255, 60 N. W. 433.

d. To Prevent the Enforcement of Some Writ or Order.—Both the issuing and the enforcement of writs are ministerial acts. If a writ

rightfully issues, its enforcement cannot be controlled or prevented by a writ of prohibition issued to the officer in whose hands it is, and whose duty it is to enforce it if valid. Questions arising respecting the persons against whom it may be enforced (Childs v. Edmunds (Cal.), 10 Pac. 130), or the property which may be seized under it (Holden v. Judge of Second City Court, 35 La. Ann. 1110), and such other questions as may be presented to the court issuing it, for the purpose of setting it aside and staying proceedings under it, do not go to the jurisdiction of the court, and furnish no sufficient reason for interposing by prohibition: Sheriff v. Judge, 46 La. Ann. 29, 14 South. 427; State v. St. Paul, 104 La. Ann. 280, 29 South. 112; Tapia v. Martinez, 4 N. Mex. 165, 16 Pac. 272; People v. Queen's County Supervisors, 1 Hill, 195; Ducheneau v. Ireland, 5 Utah, 108, 13 Pac. 87; Ex parte Gordon, 66 U. S. 503, 17 L. ed. 134. Perhaps where an order of sale is clearly void, prohibition may be denied on the ground that the party applying for it does not require its aid: Woodward v. Superior Court, 95 Cal. 272, 30 Pac. 535. It has been said, and perhaps truly in the states where it was said, that the writ of prohibition is a proper remedy to arrest the execution of an illegal or unauthorized judgment (West v. Ferguson, 16 Gratt. 270; Wilkinson v. Hoke, 39 W. Va. 403, 19 S. E. 520; City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152); but if this broad statement be generally maintainable, all other remedies must fall into desuetude. Undoubtedly, where one court has proceeded by writ of prohibition to arrest the action of another in a matter determined to be beyond or in excess of its jurisdiction, the proceeding will not be allowed to become a mere harmless form by permitting the court and the party claiming under the void judgment or order to proceed with its enforcement and thereby obtain some, and perhaps all, of the advantage sought by it. Thus, if an order appointing a receiver is found in excess of the power of the court making it, every writ or order for its enforcement must fall with it, and the effect of a writ of prohibition will include the vacation and annulment of such later writ or order, and the superior court may go still further and require everyone acquiring possession of property under the void order or any writ issued for its enforcement to restore such possession to the person from whom it was taken: Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; Bodley v. Archibald, 33 W. Va. 299, 10 S. E. 392; State v. Moore, 21 Wash. 628, 59 Pac. 487.

The issuing of a writ is also generally a ministerial act, and its issuing at an improper time, or in an improper form, or when it ought not to be issued at all, is a matter ordinarily within the control of the court whose writ it appears to be, which, on proper application, will grant relief therefrom. Hence, prohibition will rarely be allowed as against any particular writ, but there are cases in which the superior court will interpose, as by preventing a justice of the peace

from issuing compulsory process of subpoena under an information insufficient to give him jurisdiction: People v. Tuthill, 79 App. Div. 24, 79 N. Y. Supp. 905.

V. Grounds for Refusing the Writ.

a. That the Discretion of the Court so Inclines.—If it were true, as might be inferred from the expressions found in the decisions and text-books, that the granting of a writ of prohibition was within the discretion of the court to which the application for it was made, then we should expect appellate courts to review only those judgments under which the writ was granted. Thus, it has repeatedly been said that "the writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity and not for any grievances which may be redressed by ordinary proceedings at law or in equity or by appeal, and it is not demandable as a matter of right, but of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case": People v. Westbrook, 89 N. Y. 152; People v. District Court, 21 Colo. 251, 40 Pac. 460; People v. District Court, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850; Sherlock v. City of Jacksonville, 17 Fla. 93; State v. Monroe, 33 La. Ann. 923; State v. Judge, 33 La. Ann. 1284; Hudson v. Judge, 42 Mich. 239, 3 N. W. 850, 913; State v. Ward, 70 Minn. 58, 72 N. W. 825; Bedford County Supervisors v. Wingfield, 27 Gratt. 329; Clifford v. Parker, 13 Wash. 518, 43 Pac. 717. "Nor is it a writ of right granted ex debito justitiae like habeas corpus, but is granted or withheld according to the circumstances of each particular case. Being a prerogative writ, it is to be used like all such, with great caution and forbearance, to prevent usurpation and secure regularity in judicial proceedings where none of the ordinary remedies provided by law can give the desired relief, and damage and wrong will ensue pending their application": Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549; State v. Whitaker, 114 N. C. 818, 19 S. E. 376. Strictly speaking, there may not be anything incorrect in this language. It is true that the writ does not issue in every case in which the court acts without or in excess of its jurisdiction. The court to which the application is made may be of the opinion that redress should be sought by some other proceeding or in some other forum, or that the applicant has been guilty of inexcusable laches and has thereby forfeited his right to relief, or that for some other reason he ought to be denied redress; but it is not true that there is any discretion recognized in the courts to which applications are made for writs of prohibition which will sanction their denial because of the personal feelings and opinions of the judge or the bad character of the applicant, or which will exempt the action of the lower court or judge from review in the appellate courts. The more recent opinions show clearly that what was said in the earlier decisions respecting the discretion of the court applied only when the application for the writ was made by a stranger to the proceeding to be

stayed: London Corporation v. Cox, L. R. 2 H. L. 239, 36 L. J. Ex. 225, 16 Week. Rep. 44. The applicant in a proper case is now entitled to the writ as a matter of right: Fayerweather v. Monson, 61 Conn. 431, 23 Atl. 878; County Court v. Boreman, 34 W. Va. 362, 12 S. E. 490; Norfolk etc. R. Co. v. Pinnacle C. Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414. Thus, in a case wherein the charter of a corporation was properly declared forfeited, and thereupon the unauthorized appointment of a receiver was made, and a writ of prohibition was refused to prevent the enforcement of such order, and it was claimed that this refusal might be permitted to stand on appeal as an exercise of discretion vested in the subordinate court which the supreme court could not review, the latter court said: "It is next suggested that the writ of prohibition does not issue ex debito justitiae, but is to be granted or withheld in the sound discretion of the court, and in this case it ought not to be allowed in favor of these petitioners, because they are members of the sugar trust, monopolists, and are the tempters who seduced the American Sugar Refinery into the combination. There is no competent proof before us of these facts; but assuming them to be so, the law is not such as counsel claim it to be. A decision may be found here and there, saying, in a loose way, that the issuance of the writ is in the discretion of the court, and a statement, in general terms, to the same effect, may be cited from the text-writers, who merely echo the decisions, but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law. If such an idea has obtained anywhere, it has been in consequence of a misunderstanding of the English cases": Havemever v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627. The law as it is now understood upon the subject has been thus quite recently stated by the supreme court of the United States: "Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of a cause originally or in some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to the writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or dependent upon facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence and the want of jurisdiction does not appear on the face of the proceedings": In re Rice, 155 U. S. 396, 15 Sup. Ct. Rep. 149, 39 L. ed. 198; In re Alix, 166 U. S. 136, 17 Sup. Ct. Rep. 522, 41 L. ed. 948.

b. That the Court Has Jurisdiction.—It will be seen on an examination of subdivision IV and the authorities cited therein that practi-

cally the only ground for issuing the writ of prohibition is want of jurisdiction on the part of the court or other judicial tribunal against which it is sought to entertain the cause or to make the particular order or do the particular thing against which the writ is sought. If it cannot be said that the only ground for refusing the writ is the existence of jurisdiction on the part of the tribunal assailed, it may be, at least, affirmed that this is always a sufficient ground, for if jurisdiction exists, the court or tribunal possessing it must be permitted to exercise it, subject only to such action as may be taken by some appellate tribunal when its jurisdiction is properly invoked, and if there be no such tribunal, there can be no relief: Ex parte Green, 29 Ala. 52; Ex parte Brown, 58 Ala. 536; Ex parte Blackburn, 5 Ark. 21; Bishop v. Superior Court, 87 Cal. 226, 25 Pac. 435; Woodward v. Superior Court, 95 Cal. 272, 30 Pac. 535; State v. Smith, 32 Fla. 476, 14 South. 43; Coe v. Standiford, 11 B. Mon. 196; State v. Thompson, 34 La. Ann. 758; Inhabitants of Hyde Park v. Wiggin, 157 Mass. 94, 31 N. E. 693; In re Bowman, 67 Mo. 146; State v. Harrison, 53 Mo. App. 346; State v. Evans, 184 Mo. 632, 83 S. W. 447; Browne v. Rowe, 10 Tex. 183; Hartigan v. Board of Regents, 49 W. Va. 14, 38 S. E. 698; Cincinnati etc. P. Co. v. Bellville, 55 W. Va. 560, 47 S. E. 301; In re Rice, 155 U. S. 396, 15 Sup. Ct. Rep. 149, 39 L. ed. 198; London Corp. v. Cox, L. R. 2 H. L. 239, 36 L. J. Ex. 225, 16 Week. Rep. 44.

c. **That the Matter Complained of Amounts to an Irregularity or Error Only.**—It should never be forgotten that prohibition is not a revisory or correctory proceeding, nor is it one seeking relief in the court where an irregularity or error occurs. If there has been some irregularity in a proceeding, relief may often be had therefrom by a prompt application in the court where the case is pending, and sometimes redress may be had by appeal or writ of error, but however this may be, if the irregularity is not one which undermines the jurisdiction or prevents it from ever attaching, it can never support an application for a writ of prohibition: Ex parte City Council of Montgomery, 24 Ala. 98; People v. Supervisors of Kern County, 47 Cal. 81; Murphy v. Superior Court, 58 Cal. 520; Spect v. Superior Court, 59 Cal. 319; Leonard v. Bartels, 4 Colo. 95; State v. Twenty-sixth District Judge, 34 La. Ann. 611; State v. Crosby, 92 Minn. 176, 99 N. W. 636; Clayton v. Heidelberg, 9 Smedes & M. 623; State v. Burckhartt, 87 Mo. 533; Low v. Crown Point M. Co., 2 Nev. 75; People v. Nichols, 79 N. Y. 582, 58 How. Pr. 200; Tapia v. Martinez, 4 N. Mex. 165, 16 Pac. 272; State v. City of Columbia, 17 S. C. 80; State v. Road Commrs., 3 Hill, 314; Buskirk v. Judge of Circuit Court, 7 W. Va. 91; Dobson v. Westheimer, 5 Wyo. 34, 36 Pac. 626; Ex parte State of Pennsylvania, 109 U. S. 174, 3 Sup. Ct. Rep. 84, 27 L. ed. 894; Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. Rep. 453, 36 L. ed. 232; Enraght v. Penzance, 7 App. Cas. 240, 51 L. J. Q. B. 506, 47 L. T. 779, 30 Week. Rep. 753, 46 J. P. 644—H. L. (E.). It is equally

true that prohibition cannot issue to correct or prevent any mere error in the exercise of jurisdiction, whether such error occurs preceding or during a trial or in the conclusion controlling the final disposition of the cause (Walker v. District Court, 4 Ariz. 249, 35 Pac. 982; Wreden v. Superior Court, 55 Cal. 504; Southern Pac. R. Co. v. Superior Court, 59 Cal. 471; Tupper v. Dart, 104 Ga. 179, 30 S. E. 624; Willman v. District Court, 4 Idaho, 11, 35 Pac. 692; Bank Lick T. Co. v. Phelps, 81 Ky. 613; State v. Kruttschnitt, 44 La. Ann. 567, 10 South. 887; Dayton v. Paine, 13 Minn. 493 (Gil. 454); Eckerle v. Wood, 95 Mo. App. 378, 69 S. W. 45; Thomson v. Tracy, 60 N. Y. 31; People v. Nichols, 79 N. Y. 582, 58 How. Pr. 200; People v. Seward, 7 Wend. 518; State v. Columbia & A. R. Co., 1 S. C. 46; State v. Kirkland, 41 S. C. 29, 19 S. E. 215; State v. Superior Court, 32 Wash. 498, 73 Pac. 479; State v. Kyle, 8 W. Va. 711; Sperry v. Sanders, 50 W. Va. 70, 40 S. E. 327; Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448); as by ordering a judgment without trial (Clark v. Superior Court, 55 Cal. 199); awarding and fixing the compensation of a receiver when he is entitled to none (Grant v. Superior Court, 106 Cal. 324, 34 Pac. 604); directing the new trial of a person accused of crime when he has been once in jeopardy (Arnett v. Superior Court, 128 Cal. xviii, 60 Pac. 534); refusing to dismiss an indictment in a cause where the defendant was not subject to further prosecution, but his immunity could be given in evidence under the plea of not guilty (Rebstock v. Superior Court, 146 Cal. 308, 80 Pac. 65; People v. Davy, 105 App. Div. 598, 94 N. Y. Supp. 1037); so excusing grand jurors as to render an indictment nugatory (People v. District Court, 29 Colo. 83, 66 Pac. 1068); passing on a motion to change the place of trial (People v. District Court, 30 Colo. 488, 71 Pac. 388; State v. Lubke, 29 Mo. App. 555; State v. Evans, 184 Mo. 632, 83 S. W. 447); sustaining a demurrer to a plea setting up the privilege to be sued in another county (State v. Hocker, 33 Fla. 283, 14 South. 586); declaring a statute valid which was in fact unconstitutional (Scott v. Tully, 106 Ky. 69, 49 S. W. 1063); rendering judgment contrary to the law and the evidence (State v. King, 48 La. Ann. 292, 19 South. 142; State v. Fickling, 10 S. C. 301; Ward v. Evans, 49 W. Va. 184, 38 S. E. 524); overruling a plea in bar of an action (State v. Withrow, 108 Mo. 1, 18 S. W. 41); erroneously enforcing a rule of court (State v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43); suspending an executor and appointing an administrator on the mistaken assumption that the contest of a will was pending (State v. Moehlenkamp, 133 Mo. 134, 34 S. W. 468); deciding a cause contrary to the last ruling of the superior appellate court therein (Missouri etc. Ry. Co. v. Smith, 154 Mo. 300, 55 S. W. 470); refusing trial by jury (Delaney v. Police Court, 167 Mo. 667, 67 S. W. 589); ruling on notice of an election contest (State v. Evans, 184 Mo. 632, 83 S. W. 447); rejecting evidence which should have been received (In re State, 3 Rich. 111; Ex parte Bradley, 9 Rich. 95; Ex parte Higgins,

10 Jur. 838); refusing to allow testimony to be taken down by a stenographer (State v. Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548); overruling and disregarding a plea of res judicata (Wilkins v. Stiles (Vt.), 52 Atl. 1048); enjoining an execution sale (State v. Superior Court, 11 Wash. 63, 39 Pac. 244); vacating a default judgment (State v. Superior Court, 34 Wash. 643, 76 Pac. 282); continuing an election contest to another term (Moss v. Barham, 94 Va. 12, 26 S. E. 388); or any other mistake in the exercise of its functions (In re New York & P. R. S. Co., 155 U. S. 523, 15 Sup. Ct. Rep. 183, 39 L. ed. 246; Mackenochie v. Penzance, 6 App. Cas. 443, 50 L. J. Q. B. 611, 44 L. T. 479, 29 Week. Rep. 633, 45 J. P. 584—H. L. (E.); Regina v. Kent, 24 Q. B. D. 181, 59 L. J. M. C. 51, 62 L. T. 114, 38 Week. Rep. 253, 17 Cox C. C. 61, 54 J. P. 453). Nor will the application of this principle be denied on the ground that no remedy by appeal has in fact been provided: State v. Superior Court, 3 Wash. 705, 29 Pac. 213. It seems quite superfluous to add that if a court is entitled to exercise a discretion in the matter before it, a writ of prohibition cannot control such exercise or prevent its being made in any manner within the jurisdiction of the subordinate court: Jacks v. Adair, 33 Ark. 161; State v. Cole, 33 La. Ann. 1356; Vitt v. Owens, 42 Mo. 512; Board of Supervisors v. Gorrell, 20 Gratt. 484.

d. Alleged Errors in Deciding Questions of Jurisdiction.—If the error of the subordinate court respects its jurisdiction, the principles stated in the last subdivision are generally inapplicable, for if a court has not jurisdiction of a cause, it cannot judicially determine anything therein, and its decision that it has jurisdiction cannot supply its want of authority to decide at all. Where its want of jurisdiction is apparent from applying the law, which all persons and tribunals are presumed to know, to the facts disclosed by the record, there is no difficulty in applying this rule. However, jurisdiction both of the person and of the subject matter may be dependent on facts which do not appear by the record, and the establishment of which may depend on extrinsic, and sometimes on oral, evidence. Where it is within the power of the subordinate court to determine its own jurisdiction by considering and drawing conclusions from the evidence submitted to it, its determination cannot be said to be without its jurisdiction, and, as prohibition is not an appellate or correctory proceeding, it cannot, on principle, be available to correct any error which the subordinate court may have made in such determination. There are English and early American decisions from which the inference is justifiable that the decision of a court on facts going to its jurisdiction, or its error in a matter of jurisdiction dependent on facts, is reviewable on an application for a writ of prohibition: Liverpool U. G. L. Co. v. Everton Overseers, L. R. 6 C. P. 414, 40 L. J. M. C. 104, 23 L. T. 813, 19 Week. Rep. 412; State v. Hopkins, Dud. 101. On principle, this cannot be true unless in

some manner the facts are conceded or otherwise indisputably established, and the error, if any, consists in the conclusion drawn from them. If there is a return of the service of process, it is the duty of the court whose process it is to determine whether the facts disclosed by the return are such as to confer jurisdiction. Nevertheless, if it errs in concluding that such facts are sufficient, the writ of prohibition may, notwithstanding, be sustained: People v. Judge of Wayne Circuit Court, 26 Mich. 100; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178. There are, it is true, decisions, or statements in the opinions of courts making decisions, which we know not how to reconcile with this rule (Finley v. Moose, 74 Ark. 217, 109 Am. St. Rep. 79, 85 S. W. 236; State v. Benson, 21 Wash. 571, 58 Pac. 1066), but such opinions are, as to the point under consideration, dicta, or so imperfect in their statement of the facts out of which they arose that we are unable to determine whether the record disclosed the absence of the service of process or only an irregularity therein. Where the return appears by the record, or the facts are otherwise conceded or indisputably established, the court, in ruling thereon, does not determine a controverted issue of fact. But if there is presented any issue of fact relating to the jurisdiction of the court over either the subject matter of the action or a party thereto respecting which it has authority to inquire and decide, its decision, unless set aside by itself or by some strictly appellate proceeding, is final: Bankers' Life Assn. v. Shelton, 84 Mo. App. 634. "Objections to jurisdiction which are dependent on matters in pais cannot be considered on an application for this writ. They must be raised in the lower court, saved by exception, and carried up by appeal": State v. Withrow, 141 Mo. 69, 41 S. W. 980; Brown v. Cocking, 9 Best & S. 503, 37 L. J. Q. B. 672, 18 L. T. 560, 16 Week. Rep. 933. Thus, though the court has no authority to appoint a guardian for an infant already under guardianship, yet if it has general jurisdiction of the appointment of guardians, it must, as an incident to that jurisdiction, have the power to hear and determine the fact whether a guardian has previously been appointed or not. Hence, its appointment of a guardian cannot, on writ of prohibition, be questioned on the ground of an alleged pre-existing guardianship: Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310. So, in proceedings before probate and surrogate courts, on the place of residence of the person on whose estate letters of guardianship or of administration have been applied for may depend the jurisdiction of the subject matter, and hence it is the duty of the court, before granting letters, to make inquiry and determination on this subject, and prohibition cannot be sustained either to prevent such determination or to require it to be made adversely to the jurisdiction, or to set it aside when once made: Coleman v. Dalton, 71 Mo. App. 14. "If the jurisdiction depends upon a question of fact, the court in which such question is

presented must be allowed to determine that fact like any other; and if it commits error in so doing, such error cannot be corrected by appeal'': State v. Superior Court, 11 Wash. 111, 39 Pac. 818; In re Alix, 166 U. S. 136, 17 Sup. Ct. Rep. 522, 41 L. ed. 948.

e. **The Existence of Another Remedy.**—Perhaps the most difficult question connected with the law applying to writs of prohibition is the determination of when they will be denied because the applicant has some other remedy by which he may obtain relief. The courts are full of opinions containing general expressions that prohibition will not be granted where the applicant has some other speedy and adequate remedy at law: Russell v. Jacoway, 33 Ark. 191; People v. District Court, 32 Colo. 469, 77 Pac. 239; Sherlock v. City of Jacksonville, 17 Fla. 93; Hart v. Taylor, 61 Ga. 156; Town of Montezuma v. Minor, 70 Ga. 191; Bellevue W. Co. v. Stockslager, 4 Idaho, 636, 43 Pac. 568; Mason v. Grubel, 64 Kan. 835, 68 Pac. 660; State v. Richardson, 49 La. Ann. 1612, 22 South. 960; State v. King, 50 La. Ann. 19, 22 South. 928; People v. Wayne County Court, 11 Mich. 393, 83 Am. Dec. 754; Low v. Crown Point M. Co., 2 Nev. 75; Holly Shelter R. Co. v. Newton, 133 N. C. 136, 98 Am. St. Rep. 701, 45 S. E. 549; Ducheneau v. Ireland, 5 Utah, 108, 13 Pac. 87; Hogan v. Guigon, 29 Gratt. 705; Shell v. Cousins, 77 Va. 328; State v. Tallman, 38 Wash. 132, 80 Pac. 272; State v. La Crosse County Court Judge, 11 Wis. 50; In re Foster v. Foster, 4 Best & S. 187, 32 L. J. Q. B. 312, 10 Jur., N. S., 254, 8 L. T. 661, 11 Week. Rep. 779. But it is true he nearly always has a remedy at law as speedy at least as the ordinary operations of courts will permit, for it must be assumed that if a court really has not jurisdiction, or has acted in excess thereof, its judgment will either be vacated by itself on application, or if not, will be reversed on appeal or writ of error, and if no right of appeal exists, that relief will be granted by certiorari. Therefore, to maintain that prohibition will not issue when the applicant has no other remedy is almost to affirm that it will not issue at all. Much of the general language employed on this subject, when construed in the light of the circumstances to which it was addressed, amounts to no more than affirming that it will not be presumed that the court against which the writ is sought will attempt to proceed further if its attention is first called to its want of jurisdiction (Ex parte Hamilton, 51 Ala. 62; Hill v. Tarver, 130 Ala. 592, 30 South. 499; Ex parte Boothe, 64 Ala. 312); or that in the case presented for consideration, the court did have authority to act, and hence that its action was, at most, erroneous merely and is error such as could be relieved by appeal: Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157; Murphy v. Superior Court, 84 Cal. 594, 24 Pac. 310; Mines D'Or v. Superior Court, 91 Cal. 101, 27 Pac. 532; Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49; People v. District Court, 21 Colo. 251, 40 Pac. 460; People v. Stevens, 33 Colo. 306, 79 Pac. 1018; State v. Rightor, 44 La. Ann. 298, 10 South.

774; State v. Monroe, 48 La. Ann. 27, 18 South. 701; State v. Perez, 48 La. Ann. 1348, 20 South. 164; State v. Municipal Court, 26 Minn. 162, 2 N. W. 166; State v. Cory, 35 Minn. 178, 28 N. W. 217; State v. Whitaker, 114 N. C. 818, 19 S. E. 376; Riley v. Town of Greenwood, 72 S. C. 90, 110 Am. St. Rep. 592, 51 S. E. 532; Town of Davis v. Davis, 40 W. Va. 646, 21 S. E. 906. On the other hand, there have been numerous applications for writs of prohibition in which it appeared that the attention of the trial court had been called to its want of jurisdiction, and that it, nevertheless, persisted in proceeding, and in which it further appeared that it had not jurisdiction, and where, nevertheless, the application for prohibition was denied on the ground that the remedy was by some appellate proceeding: White v. Superior Court, 110 Cal. 54, 42 Pac. 471; Carr v. Superior Court, 147 Cal. 227, 81 Pac. 515; People v. District Court, 11 Colo. 574, 19 Pac. 541. In other and less numerous cases the writ has been denied on the ground that the applicant had an adequate remedy in another suit or proceeding, as by one for an injunction against the enforcement of the alleged void order (State v. Hunter, 4 Wash. 712, 30 Pac. 1055); or by the attaching of property in the hands of a receiver on the ground that the order under which he claimed the right to its possession was void, and that it hence remained subject to attachment: State v. Superior Court, 7 Wash. 77, 34 Pac. 430.

By the Code of Civil Procedure of California the writ is, in effect, confined to those cases in which the applicant has not a plain, speedy and adequate remedy in the ordinary course of law. This is, doubtless, but a statutory expression of the common law on the subject. Indeed, it must otherwise be ineffective, for, as the power to grant the writ is conferred by the constitution, it cannot be diminished by statute. The fact that an applicant has a remedy by appeal or some other proceeding is by no means conclusive against his right to the writ. It is sometimes said that the court, when another remedy exists, has a discretion to compel the applicant to resort to that remedy instead of granting the writ. If the discretion exists, and this we do not doubt, it is a discretion controlled by the rules of law, and subject to review in the superior courts, which will interpose by issuing the writ though a remedy exists by appeal, certiorari, or the like, unless the remedy is also speedy and adequate. The fact that the remedy by appeal involves expense and delay sometimes warrants the issuing of the writ, especially when the right to it is clear and its issuing will not necessitate the trial of controverted issues of fact. Thus, if a demurrer to a complaint is sustained, and the plaintiff declining to amend, judgment is entered against him, from which he appeals, and the judgment is affirmed, he is not thereafter entitled to amend such complaint, and if the court enters an order allowing him to amend and is about to proceed to trial on the amended complaint, prohibition may issue though an appeal might have been prosecuted from the order allowing the amendment. The defendant

should not be "put to the delay and expense of an appeal. The remedy, while it would be adequate, would not be speedy": Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119. Probably those cases in which receivers are appointed without authority, or though appointed with authority, orders are subsequently made beyond the jurisdiction of the court requiring property to be put in their possession, must be regarded as somewhat exceptional in character, because the receiver cannot be resisted without involving an apparent contempt of court. The resort to an appeal may require the party to submit to the loss of possession of his property against which he can have no redress during the pendency of the appeal, and the court itself may, to a certain extent, be deemed so far a party to the wrong as not to constitute an impartial tribunal to which resort may be had with the reasonable expectation that it will undo its wrong. The fact that a remedy exists, both by appeal to the higher court and by motion in the court where the order complained of was made, does not present so clear a case of an adequate and speedy remedy as to warrant the denial of the writ of prohibition: Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; Stuparich Mfg. Co. v. Superior Court, 123 Cal. 290, 55 Pac. 985; St. Louis etc. R. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 33 L. R. A. 341. If a mortgagor has a present right to the dismissal of an action of foreclosure on the ground that the summons has not been served within the time permitted by the statute, but the court, instead of dismissing the action, makes an order directing the issuing of an alias summons, it will be prohibited from proceeding further. In this case, the court said: "Respondents also claim that, notwithstanding the issuance of the alias summons may be in excess of jurisdiction, still the writ of prohibition should not issue because the petitioner has a plain, speedy and adequate remedy at law by appeal from any judgment that may be rendered against him in the action. Such a remedy by appeal is perhaps plain, but can hardly be called speedy or adequate. Petitioner has a present right of dismissal of the action as against himself and the removal of the lien by which the property is encumbered, and such right cannot be protected or enforced by an appeal from a possible judgment in an action to foreclose": People v. District Court, 33 Colo. 293, 80 Pac. 908. We think the present inclination of the courts where a clear case of want of jurisdiction exists, and the enforcement of the judgment or order or the permitting it to stand unquestioned would deprive the applicant of the possession of property, or of an office, or his personal liberty, or otherwise seriously embarrass him, is to grant the prohibition notwithstanding the existence of a right of appeal: People v. District Court, 26 Colo. 386, 58 Pac. 604, 46 L. ed. 850; People v. District Court, 30 Colo. 123, 69 Pac. 597; People v. District Court, 32 Colo. 15, 74 Pac. 896; Weaver v. Toney, 107 Ky. 419, 54 S. W. 732, 50 L. R. A. 105; State v. Commercial Court, 4 Rob. 48; State v. Judge of Fourth Dis-

trict Court, 20 La. Ann. 239; State v. McCrea, 40 La. Ann. 20, 3 South. 380; State v. Wilcox, 24 Minn. 143; Crisler v. Morrison, 57 Miss. 791; St. Louis etc. Ry. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 33 L. R. A. 341; State v. Sale, 188 Mo. 493, 87 S. W. 967; State v. Allen, 45 Mo. App. 551; Bell v. First Judicial District (Nev.), 81 Pac. 875; Gates v. McGee, 15 S. Dak. 247, 88 N. W. 115; State v. Superior Court, 13 Wash. 638, 43 Pac. 877. "The court will decline to award prohibition where the party can readily obtain the desired relief by other methods of procedure, as was held in Mastin v. Sloan, 98 Mo. 252, 11 S. W. 558. But those methods must be reasonably adequate, prompt and efficient. The granting of a prohibitory writ is discretionary in the sense that the court will not issue it unless the facts exhibited appear to justify the resort to such remedy. Where other convenient and effective modes of reaching the same result are open to the complaining party, the court may decline to award the extraordinary remedy. Whether other modes of relief are equally effective is a question to be determined by each particular exigency. And where a state or condition is presented calling for the use of the writ according to the principles and usages of law, and where no other remedy is available, its allowance is not discretionary, but a matter of right under our constitution": Ellis v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037.

The fact that the rights of persons not parties to the action are involved may constitute an additional reason for issuing a writ of prohibition though a remedy by appeal might be prosecuted with success. Thus, if the order complained of is made in an election contest and requires the exposure of the ballots of all persons voting at an election, prohibition will issue. "If any court attempts to exercise jurisdiction in a cause or in a manner not authorized by law, it is the duty of this court, under its supervisory jurisdiction over all inferior courts, to prohibit it. In this respect and for these reasons contested election contests are not like ordinary cases. The damage to the voter could not be repaired by correcting such errors of the trial court on appeal or writ of error": Funkhouser v. Spencer, 166 Mo. 271, 65 S. W. 981.

On the other hand, where the right of appeal exists, and by exercising it, the party complaining of an alleged void order or judgment can obtain relief without any serious injury (Weaver v. Leatherman, 66 Ark. 211, 49 S. W. 977), or the proceedings under the order may be effectually stayed by an appeal (Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826), prohibition will not issue.

There is quite a numerous class of cases in which the application for the writ of prohibition is but another mode of obtaining the judgment or opinion of the supreme court on questions which go to the jurisdiction of the lower court, but which are bona fide the subjects of litigation before it, or necessarily involved therein, and in which it is its duty to pronounce some judgment on a question involving its jurisdiction or its right to proceed in the matter com-

plained of. In such a case, the appellate court rarely permits its powers to be prematurely invoked by prohibition, but allows the inferior court to proceed to final judgment, leaving the applicant to the appellate remedies open to him: Tomboy G. M. Co. v. District Court, 23 Colo. 441, 48 Pac. 537; People v. District Court, 29 Colo. 1, 66 Pac. 888; State v. Neal, 30 Wash. 702, 71 Pac. 647. Thus, where the constitutionality of a statute is involved, the supreme court will rarely grant prohibition in advance of the trial or determination in the inferior court where the question is presented, though it may be that the higher court will, when the question is presented to it, determine that the statute is unconstitutional, and the inferior court without jurisdiction: State v. Rost, 49 La. Ann. 1451, 22 South. 421; State v. District Court, 32 Mont. 394, 80 Pac. 673. Nor will the higher court interpose in any other case in which it appears that the applicant may be required to present his contention by appeal or writ of error without, in effect, depriving him of some present right or seriously embarrassing him in its exercise: Rust v. Stewart, 7 Idaho, 558, 64 Pac. 222; Kilty v. Jackson, 184 Mass. 310, 68 N. E. 236; State v. Ward, 70 Minn. 58, 72 N. W. 825; Chicago etc. Ry. Co. v. Woodson, 110 Mo. App. 208, 85 S. W. 105; People v. Sherman, 171 N. Y. 684, 64 N. E. 1124; People v. Sherman, 66 App. Div. 231, 72 N. Y. Supp. 718; Overland G. M. Co. v. McMaster, 19 Utah, 177, 56 Pac. 977; State v. Superior Court, 19 Wash. 118, 52 Pac. 1009; State v. Superior Court, 21 Wash. 631, 59 Pac. 505; State v. Superior Court, 30 Wash. 700, 71 Pac. 648; State v. Superior Court, 31 Wash. 410, 71 Pac. 1100; Knight v. Zahnhiser, 53 W. Va. 370, 44 S. E. 778; State v. Pollard, 112 Wis. 232, 87 N. W. 1107; In re Gates, 117 Wis. 445, 94 N. W. 292; In re Huguley Mfg. Co., 184 U. S. 297, 22 Sup. Ct. Rep. 455, 46 L. ed. 549.

While the delay and expense of an appeal have sometimes been spoken of by the court as influencing its determination to grant the writ of prohibition, neither of itself, nor both together, are entitled to a controlling effect, if the case is one which, independently of their consideration, does not call for the granting of the writ: Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; State v. Superior Court, 30 Wash. 700, 71 Pac. 648.

In applications for prohibition, the fact that no remedy exists by appeal is sometimes referred to as though it of itself constituted a sufficient reason for granting the relief sought. Such, however, is not the case. As we have heretofore shown, the writ of prohibition is not grantable while there is some other plain, speedy and adequate remedy at law, and such a remedy often exists in the right of appeal and furnishes a sufficient reason for denying the application. If there is no right of appeal, this remedy must, of course, be excluded from the consideration of the court and cannot constitute a ground for the denial of the writ. Its absence, however, does not warrant the issuing of the writ unless sufficient cause exists therefor, in that

the court against which it is sought is acting, or about to act, without or in excess of its jurisdiction. If, on the other hand, it is acting, or about to act, within its jurisdiction, the absence of a right of appeal cannot justify the issuing of the writ, though if an appeal were possible, the appellate court must declare that the action in question is erroneous and requires the reversal of the judgment or order assailed: People v. De France, 29 Colo. 309, 68 Pac. 267; Bank L. T. Co. v. Phelps, 81 Ky. 613; State v. Nathan, 4 Rich. 513; Ex parte Bradley, 9 Rich. 95; State v. Superior Court, 3 Wash. 705, 29 Pac. 213; Ex parte Detroit R. F. Co., 104 U. S. 519, 26 L. ed. 815.

VI. Proceedings to Obtain the Writ.

a. Necessity for Objecting in the Subordinate Court.—We have heretofore frequently had occasion to state that the writ or prohibition will ordinarily issue only where there is no other adequate remedy. The application of this principle must require the party seeking to prevent the action of a judicial tribunal in a matter in which it has no jurisdiction, or beyond the bounds of such jurisdiction as it has, to employ such remedies as may be available to him in that tribunal. Hence, he ought in some manner to call its attention to its alleged want of jurisdiction and ask it either not to act at all, or, at all events, not to take action beyond its jurisdiction. The rules of some of the supreme and other courts of the highest dignity and authority prescribe, as a condition precedent to the exercise of their power to issue writs of prohibition, that objection be interposed in the court whose action is sought to be prohibited, and that its attention be thereby or otherwise called to its want of authority. Whether any special rule of court has been promulgated on this subject or not, undoubtedly the practice generally prevailing in the United States is not to take any action until it appears that the subordinate tribunal has in some appropriate method had its attention called to its supposed absence or excess of jurisdiction, and has, nevertheless, indicated its purpose to proceed, or it in some other manner sufficiently appears that an application to that court must prove unavailing: Ex parte Hamilton, 51 Ala. 62; Hill v. Tarver, 130 Ala. 192, 30 South. 499; Ex parte City of Little Rock, 26 Ark. 52; Butler v. Williams, 48 Ark. 227, 2 S. W. 843; Reese v. Steele, 73 Ark. 66, 83 S. W. 335, 1136; Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; People v. District Court, 30 Colo. 488, 71 Pac. 388; State v. Allen, 47 La. Ann. 600, 18 South. 634; State v. Mayer, 52 La. Ann. 255, 26 South. 823; Hudson v. Judge, 42 Mich. 239, 3 N. W. 850, 913; Forsee v. Gates, 89 Mo. App. 577; Tapia v. Martinez, 4 N. Mex. 165, 16 Pac. 272; Walcott v. Wells, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367, 9 L. R. A. 59; People v. Carrington, 5 Utah, 531, 17 Pac. 735; State v. Superior Court, 13 Wash. 226, 43 Pac. 43; Education v. Holt, 51 W. Va. 435, 41 S. E. 337; Knight v. Zahnhiser, 53 W. Va. 370, 44 S. E. 778; Jennings v. Bennett, 56

W. Va. 146, 49 S. E. 23; State v. District Court, 5 Wyo. 227, 39 Pac. 749; State v. District Court, 12 Wyo. 547, 76 Pac. 680. "If the lower court has assumed to enter orders without the requisite notice to the interested parties, that is an error which it has authority to correct on motion by anyone entitled to be heard," and in the absence of such motion, the supreme court will not interpose by prohibition: People v. District Court, 30 Colo. 488, 71 Pac. 388.

The requirement that objection be made in the court whose proceeding is sought to be prohibited is not absolute. The purpose of the requirement is to assure that that court shall be treated with due respect by warning it of its possible error and thus rescuing it from the humiliation of being compelled to desist by the action of the supervising court when the action of the former was a mere inadvertence which it would willingly have avoided had its attention been called to the matter, and the time required for the proceeding in the higher tribunal might have been also thereby saved to it; but the objection in the lower court cannot be said to be jurisdictional, and the higher court may and will proceed without such objection in proper cases. In truth, under the English practice, no objection need be made in the subordinate tribunal in any case where its want of jurisdiction is apparent from an inspection of the record: Mayor of London v. Cox, L. R. 2 H. L. 239, 36 L. J. Ex. 225, 16 Week. Rep. 44; Farquharson v. Morgan [1894], 1 Q. B. 552, 63 L. J. Q. B. 474, 9 R. 202, 70 L. T. 152, 42 Week. Rep. 306, 58 J. P. 495—C. A.; Haber v. Portugal, 17 Q. B. 171, 20 L. J. Q. B. 488, 16 Jur. 164. In America, even in cases of this class, though the courts sometimes proceed where no objection has been made in the lower court and it has had no "opportunity to determine in the first instance the question of jurisdiction" (Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; People v. District Court, 29 Colo. 182, 68 Pac. 242), generally there must be something exceptional to induce them to do so. Perhaps the question whether the lower court should be given an opportunity, through objection made or motion interposed, to rule on its jurisdiction may correctly be regarded as resting in the sound discretion of the higher court, and such discretion will usually be exercised in favor of exacting some proceeding by means of which the subordinate court is called upon to pause and consider whether it will take, or if already taken, will refuse to recede from its unauthorized act. In Colorado, while it was said that the usual course would be required in cases involving only private rights, the court did not hesitate to determine the application for the writ where public interests were involved, though no plea to the jurisdiction had been interposed or overruled in the subordinate court: People v. District Court, 29 Colo. 182, 68 Pac. 242.

Where a trial court, after a reversal of its judgment, made an order conflicting with the mandate of the appellate tribunal, the latter said: "Under these circumstances, it was not necessary to tender a

plea to the jurisdiction in the circuit court and obtain a ruling thereon before resorting to the remedy by prohibition. Where the want or excess of jurisdiction relates to the subject matter and is apparent on the face of the proceedings, and the court has made some order in the exercise of such unauthorized jurisdiction, as in the case here, prohibition will lie even though no plea to the jurisdiction has been tendered. While there are some authorities to the contrary, this is clearly the rule of the common law, and therefore binding on us'': State v. White, 40 Fla. 297, 24 South. 160; State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393. Writs of prohibition have been issued when want of jurisdiction appeared on the face of the record, though the questions involved were not presented to the subordinate court, more frequently in Missouri than elsewhere in the United States, as where the appointment of a receiver was made ex parte in vacation, and therefore no opportunity existed for objecting to it when made (St. Louis etc. R. R. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 35 L. R. A. 341); or an order was entered enjoining one from entering upon a public office to which he had been elected (State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; State v. Dearing, 184 Mo. 647, 84 S. W. 21); or the judge making the order assailed appeared in the higher court for the purpose of justifying it (State v. Spencer, 164 Mo. 23, 63 S. W. 1112). In truth, not only is the requirement of an application to the superior court a matter of discretion in that state, but the practice of its highest court would almost justify the conclusion that the discretion will ordinarily be exercised in favor of acting without such application. Speaking of the subject here under consideration, the court said: ''The point is made on behalf of respondents that relators cannot have prohibition, because the lack of such jurisdiction has not been raised or pleaded in the lower court, and that this is elementary law. This view is frequently found in the text-books, but this is not the law if it is to be taken as invariably true—true without variation or shadow of turning. In fact, there are so many exceptions to the hackneyed rule that the doctrine it announces is now received with many degrees of allowance, and, as will presently appear, is not an absolute touchstone of jurisdiction. In short, the fact of having pleaded lack of jurisdiction in the lower court is by no means the sine qua non of jurisdiction in the supervising court to issue the provisional rule'': State v. Eby, 170 Mo. 497, 71 S. W. 52. A majority of the judges of the supreme court of New Mexico committed themselves to the broad proposition that it is not necessary to plead the jurisdiction of an inferior court as a foundation for a writ of prohibition where the court had no jurisdiction of the original subject matter: Lincoln-Lucky etc. M. Co. v. District Court, 7 N. Mex. 486, 38 Pac. 580. This is undoubtedly the rule now generally prevailing (State v. Hirzil, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; State v. Oliver, 163 Mo. 679, 64 S. W. 128; Commonwealth v. Latham, 85 Va. 632, 8 S. E. 488), subject to the qualifi-

cation that the supervising court will in many cases exercise a discretion in favor of requiring the question to be presented in the subordinate court, except when the former court has acted in apparent defiance or disrespect of the latter (Board of Education v. Holt, 54 W. Va. 167, 46 S. E. 134), or it is reasonably certain that any application to it will prove futile, or the questions involved relate to public affairs and interests, and their speedy disposition must promote the public welfare.

b. When the Application for the Writ may be Made.

1. The Earliest Time.—Of course, the fact that a proceeding is commenced in a court having no jurisdiction of its subject matter, or that a court in a proceeding in which it has jurisdiction is about to be asked to do something in excess thereof, will not alone support an application for a writ of prohibition, for the court in which the proceeding is so commenced may refuse to entertain jurisdiction over it, or to which such application is about to be made may, when it is made, deny it: Ex parte State, 51 Ala. 60; Prignitz v. Fischer, 4 Minn. 366. Hence, the mere apprehension that a court will act beyond or in excess of its jurisdiction cannot support an application for the writ: State v. Moore, 33 La. Ann. 923; State v. Twenty-first District Judge, 33 La. Ann. 1284; State v. Ellis, 40 La. Ann. 818, 5 South. 530. Doubtless something must be done by the court from which the inference may fairly be drawn that, unless prohibited, it will act beyond or in excess of its jurisdiction. Every application for a writ before this is premature. Whether the court will so act can rarely be known until some objection is made to its action or some motion is interposed calling it into question and thereby challenging the jurisdiction. And when the objection is interposed or motion made and the court still retains it under consideration, prohibition will not issue in advance of the decision of the subordinate court: Chester v. Colby, 52 Cal. 516. Therefore, the earliest time to which the writ can be applied for reasonable hope of success is immediately after the court, on its jurisdiction being challenged by objection or motion, overrules the objection, denies the motion, or otherwise expressly or by necessary implication announces its purpose to proceed.

2. The Latest Time.—It is sometimes said that delay and acquiescence may bar the right of prohibition: Yates v. Palmer, 6 Dowl. & L. 283; In re Denton, 1 Hurl. & C. 654, 32 L. J. Ex. 89, 9 Jur., N. S., 337, 7 L. T. 689, 11 Week. Rep. 268. This is rarely true. If the want of jurisdiction appears on the face of the record or proceedings, the judgment or order is necessarily void, and time cannot impart validity to it. Hence, the fact that final judgment has been entered will not, where the want of jurisdiction so appears, preclude the application for, and the granting of, a writ of prohibition to prevent subsequent proceedings for its enforcement, whether the objection of want of jurisdiction was made in the subordinate court or not: Farquaharson v. Morgan, [1894] 1 Q. B. 552, 63 L. J. Q. B. 474, 9 R. 202, 70 L. T.

152, 42 Week. Rep. 306, 58 J. P. 495—C. A.; Roberts v. Humby, 3 Mees. & W. 120, M. & H. 331, 6 D. P. C. 82. So long as anything remains to be done under a void judgment or order, prohibition may prevent the doing of it: State v. Rombauer, 105 Mo. 103, 16 S. W. 695; State v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037. Where the want of jurisdiction does not appear on the face of the proceedings, the judgment or order resulting therefrom is rarely void, and hence it cannot, in ordinary circumstances, be questioned on prohibition. At all events, where the want of jurisdiction does not so appear, it is clearly the duty of the party against whom it is sought to be exercised to call the facts on which he relies to the attention of the court and establish them by such evidence as may be competent and sufficient, and, failing to do so until after judgment is entered against him, he may be regarded as waiving his right, if such waiver be legally possible, or it may be said that prohibition is not a writ of right, and will not be employed in his favor because of his laches or acquiescence: State v. Whyte, 2 Nott. & McC. 174; Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. Rep. 453, 36 L. ed. 232; Buggin v. Bennett, 4 Burr. 2035; Broad v. Perkins, 21 Q. B. D. 533, 57 L. J. Q. B. 638, 60 L. T. 78, 37 Week. Rep. 44, 53 J. P. 39—C. A. Where, however, there is a want of jurisdiction apparent on the face of the record, we apprehend that prohibition may issue irrespective of the lapse of time if the circumstances remain such that the writ can operate effectively. If the act sought to be prohibited has already been done, prohibition is not a proper remedy to undo it. The court, by issuing the writ, neither reverses nor vacates a judgment, order, or decree already entered. As against such, it will not entertain an application for prohibition for the sufficient reason that the writ, if granted, must prove futile. It may be, however, that some proceeding remains to be taken to carry out the judgment, and if so, such proceeding is subject to prohibition, but as to the original judgment or decree and as to all proceedings completed under it, they are alike exempt from subsequent proceedings for prohibition: Sanford v. District Court (Ariz.), 71 Pac. 906; Pope v. Colbert, 95 Ga. 791, 22 S. E. 703; State v. Judge of Tenth Judicial Dist., 38 La. Ann. 178; State v. Judge of Second Recorder's Court, 44 La. Ann. 1093, 11 South. 872; State v. Judges of Circuit Court, 48 La. Ann. 116, 20 South. 678; State v. Potts, 50 La. Ann. 409, 23 South. 297; State v. St. Paul, 104 La. 280, 29 South. 112; Dayton v. Paine, 13 Minn. 493; In re Roe Chung, 9 N. Mex. 130, 49 Pac. 952; People v. Board of Commrs. of Excise, 1 Civ. Pro. Rep. 244; People v. Excise Commrs. 61 How. Pr. 514; State v. Stackhouse, 14 S. C. 417; Brooks v. Warren, 5 Utah, 89, 12 Pac. 659; State v. Tolman, 38 Wash. 132, 80 Pac. 272; State v. Superior Court, 3 Wash. 702, 29 Pac. 204; Haldeman v. Davis, 28 W. Va. 324; Town of Hawk's Nest v. County Court, 55 W. Va. 689, 48 S. E. 205; United States v. Hoffman, 71 U. S. 158, 18 L. ed. 354. On the other hand, until the act sought to be prevented is actually done, it is

not too late to apply for the writ of prohibition. Certainly, where there is a want of jurisdiction over the subject matter, this want can never be waived, and hence no implied waiver or estoppel can arise from the fact that the parties seeking relief took some other step in the action before applying for prohibition: Lee v. Cohen, 71 L. T. 824—C. A. A void judgment, therefore, cannot preclude the granting of prohibition against proceedings based upon it where the want of jurisdiction appears on the face of the record (Clark v. Rosenda, 5 Rob. (La.) 27; State v. Lee, 106 La. 400, 31 South. 14; Hein v. Smith, 13 W. Va. 358; Ensign Mfg. Co. v. McGinnis, 30 W. Va. 532, 4 S. E. 782); and where the court is petty or statutory, or, in other words, not a court of general jurisdiction, the writ may issue after judgment and before it is carried into effect, though the want of jurisdiction can be made to appear only by averment and proof of facts dehors the record: Hutson v. Lowry, 2 Va. Cas. 42; Bodley v. Archibald, 33 W. Va. 229, 10 S. E. 392. While so far as we are aware the question has not been presented and necessarily determined, it appears probable that the prosecution and pendency of an appeal do not necessarily constitute an answer to an application for a writ of prohibition: Harrington v. Ramsay, 8 Ex. 879, 22 L. J. Ex. 326, 1 Week. Rep. 456.

c. **Who may Apply for the Writ.**—The keeping of the courts within their jurisdiction is a matter of great public concern, and, therefore, one in which the sovereign and all his subjects has an interest. Hence, where the common law upon the subject has not been abrogated by statute, it is by no means essential that the applicant for the writ be a party to the proceedings against which it is sought, or that he have any interest in the matter other than or different from that of every other citizen: Baker v. Clark, L. R. 8 C. P. 121; Quartly v. Timmins, L. R. 9 C. P. 416, 22 Week. Rep. 488. While some of the English decisions maintain that when the application for the writ is by a stranger, the court may, at its discreton, refuse it (Regina v. Twiss, L. R. 4 Q. B. 407, 10 Best & S. 298, 38 L. J. Q. B. 228, 20 L. T. 522, 17 Week. Rep. 765; Chambers v. Green, L. R. 20 Eq. 552, 44 L. J. Ch. 600); others insist that if the inferior court is exceeding its jurisdiction, the higher must interpose, though the applicant is a stranger: Haber v. Portugal, 17 Q. B. 171, 20 L. J. Q. B. 488, 16 Jur. 164; Worthington v. Jeffries, L. R. 10 C. P. 379, 44 L. J. C. B. 209, 32 L. T. 606, 23 Week. Rep. 750. At the common law the writ was sued out in the name of the crown or the state: Connecticut R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 367. In the United States, we believe, even where no statute has been adopted controlling the matter, the court to which application is made by a stranger for a writ of prohibition has a discretion to refuse it: Kilty v. Railroad Commrs., 184 Mass. 310, 68 N. E. 236. Very generally, statutes have been adopted under which the proceeding has been controlled as to the parties plaintiff or applicant like other legal actions. Hence, the application need not be in the name of the state (State v. Hirzel, 137

Mo. 435, 37 S. W. 921, 38 S. W. 961; State v. Seay, 23 Mo. App. 623); and may, doubtless, be by any person injuriously affected by the action which he seeks to prevent (Ex parte Hill, 38 Ala. 429), but not by a person having no interest therein. If a county is injuriously affected, the application may be by its attorney: State v. Superior Court, 4 Wash. 30, 29 Pac. 764. If a corporation de facto is the party beneficially interested, it may apply for the writ, and, on the application, inquiry will not be made as to whether it is a corporation de jure: State v. Superior Court, 15 Wash. 668, 55 Am. St. Rep. 907, 47 Pac. 31, 37 L. R. A. 111. As heretofore suggested, if the court is without jurisdiction of the subject matter, consent cannot confer it. Therefore, a plaintiff, notwithstanding he has instituted an action, is not estopped from applying for prohibition to prevent the court from proceeding with it, if without jurisdiction: Reese v. Lawless, 4 Bibb, 394; Paxton v. Knight, 1 Burr. 314.

d. The Respondents or Defendants in the Proceeding.—At the common law "when the suit complained of is brought by a private person, he may be joined as a defendant, but when it is a suit or prosecution on behalf of the government, the writ of prohibition may go to the court only": Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. Rep. 570, 29 L. ed. 601. This rule prevails in the United States where not abolished by statute: Thomson v. Tracy, 60 N. Y. 31. In many jurisdictions the court or judge is the only respondent or party defendant (Sherlock v. City of Jacksonville, 17 Fla. 93; State v. Judge of First District Court, 19 La. 174; State v. Mix, 33 La. Ann. 794), unless a rule of court requires the other interested persons to be made parties, or, at least, to be given notice of the proceeding and afforded an opportunity to resist it: Lincoln-Lucky etc. M. Co. v. District Court, 7 N. Mex. 486, 38 Pac. 580. In West Virginia, it was held that an application by citizens to prevent the reduction of taxes on property of a railway corporation was demurrable for not making it a party respondent: Armstrong v. Taylor, 15 W. Va. 190.

e. The Application for the Writ.—The practice at the common law on an application for a writ was thus stated in an early, but leading, case: "The suggestion stated the nature of the case, the proceedings in the court below, and concluded with a prayer for prohibition. If the motion was founded on motion for suggestion only, an affidavit of the truth of the matter suggested was necessary: Savill v. Kirby, 10 Mod. 387; Burdett v. Newell, 2 Ld. Raym. 1211, Salk. 549; but it was otherwise where the truth of the suggestion appeared on the face of the proceedings below, though after judgment: Godfrey v. Llewellin, 2 Ld. Raym. 549; Selby v. York, C. T. Hard. 392. Upon the suggestion being filed, the court granted a rule to show cause why the writ should not issue, which was afterward made absolute, or changed, according to the circumstances of the case. If it was a nice or doubtful case, the court made the rule absolute, and directed the party applying to declare, which he did, by serving the other

side with the rule, without taking out a writ, and then delivering a declaration. If the defendant then submitted, he might refuse to declare, and the court would then, on his application, stay the proceedings, without costs, because he acknowledged that the rule ought to go, and declined relying on the proceedings below (Croucher v. Collin, 1 Saund. 136, n. 1; Bull. N. P. 218; Gegge v. Jones, 2 Strange, 1149); or the defendant might insist upon a declaration. But if the court was of opinion against a prohibition, the party applying had no right to declare: Rex v. Bishop of Ely, 1 W. Black. 81, 1 Burr. 198. The inferior court was bound to desist immediately on the application for a writ of prohibition, and the court above took notice of their practice to do so, and would take care there should be no further proceedings, by attaching the judge of the inferior court for his contempt in going on: 1 Saund. 136, n. 2. By the declaration the party who applied for the prohibition, suing qui tam, complained of the party proceeding against him in the inferior court of a pleading, wherefore he prosecuted his plea in the court below, etc., after a prohibition to the contrary thereof, directed and delivered to him, for this, to wit: that where, etc., setting forth all the facts, the objection to the jurisdiction made in the court below, and the refusal of the court to admit the plea and allegation, concluding that the defendant is endeavoring and contriving to obtain, or has judgment and condemnation, though the writ of prohibition had been directed delivered to him on, etc., to the contrary, in contempt of the plea, and to the damage of the plaintiff, etc., concluding with the common ad damnum: Croucher v. Collins, 1 Saund. 136; Lilly's Entries, 316, 328. This declaration commenced an action, which, in notion of law, founded upon attachment against the defendant, for a contempt, in proceeding after a writ of prohibition had been served upon him. But it was a mere fiction, used for the purpose of trying, with greater certainty, whether the inferior court ought to proceed further in the suit. The defendant was not, in fact, served with any writ of prohibition, and, therefore, had not, in truth, incurred any contempt for disobedience of it, but this matter was alleged for form's sake, to entitle the plaintiff to demand damages of the defendant, and thereby give the action the requisites of a suit'': Ex parte Williams, 4 Ark. 537, 38 Am. Dec. 46.

At the present time, in the United States, the application is sometimes made by complaint or declaration, and perhaps more frequently, by affidavit. Whatever be the name given to the paper or pleading on which the application is based, it must disclose facts from which the inference follows that the lower court, unless prohibited, will act beyond or in excess of its jurisdiction, and the other conditions necessary to justify the issuing of the writ: Barnes v. Gottschalk, 3 Mo. App. 222. If, by the rules of the court where the application is made, it is necessary that the question of jurisdiction should be first presented to the lower court, then such presentation must be

shown, and, notwithstanding, that the court will proceed unless prohibited: Ex parte McMeechen, 12 Ark. 70. To this end, acts or declarations of the court should be disclosed sufficient to show its intention to proceed: Hevren v. Reed, 126 Cal. 219, 58 Pac. 536; Prignitz v. Fischer, 4 Minn. 366 (Gil. 275); Harris v. Brooker, 8 Wash. 138, 35 Pac. 599; Clifford v. Parker, 13 Wash. 518, 43 Pac. 717; Haldeman v. Davis, 28 W. Va. 324. The absence of jurisdiction must clearly appear (Tapia v. Martinez, 4 N. Mex. 165, 16 Pac. 272), and also the absence of other adequate remedy, and such absence is not sufficiently alleged by a general statement, but must be supported by the allegation of matters of fact from which the inference on which the pleader relies results: State v. Ellis, 47 La. Ann. 1602, 18 South. 636. The affidavit may be made or declaration verified by the attorney of the applicant where he is informed of the facts and his client is not (State v. Superior Court, 17 Wash. 54, 48 Pac. 733); and whether the verification is by the attorney or by the party, it must appear that the affiant has knowledge or information concerning the matter stated by him: Cariaga v. Dryden, 30 Cal. 244. The applicant need not, however, it is said, swear to facts which appear from the record itself of the case in which the application is made: State v. Judge, 19 La. 174; Berthaud v. Police Jury, 7 Rob. 550. The declaration closes with a prayer that the writ of prohibition be awarded (Burch v. Hardwicke, 23 Gratt. 51); but perhaps it is sufficient merely, after stating appropriate facts, to pray for general relief: State v. Lapeyrollerie, 38 La. Ann. 912.

f. The Notice or Order to Show Cause.—Prohibition, like every other judicial proceeding, must be supported by some notice to the parties against whom it is prosecuted which will both warn them of the proposed action against them and give an opportunity to show why it should not be taken. In the modern American practice a rule to show cause is granted, or an alternative writ of prohibition issued, or a notice is given that at a time and place specified, an absolute writ will be applied for. In New York, "the alternative writ may be granted upon an affidavit or other written proof showing a proper case therefor, and either with or without previous notice of the application, as the court thinks proper": N. Y. Code Civ. Proc., sec. 2091. In the same state, "The alternative writ must be directed to the court in which, or the judge before whom, and also to the party in whose favor the proceedings to be restrained were taken or are about to be taken. It must command the court or judge, and also the party, to desist and refrain from any further proceedings in the action or special proceeding, or with respect to the particular matter, or the thing described therein, as the case may be, until the further direction of the court issuing the writ; and also to show cause at the time when and the place where the writ is made returnable why they should not be absolutely restrained from any further proceedings in that action, special proceeding, or matter.

The writ need not contain any statement of the facts or alleged objections upon which the relator founds his claim to relief'': N. Y. Code Civ. Proc., sec. 2094.

In other states a rule to show cause answers the purpose of the alternative writ: Ex parte Keeling, 50 Ala. 474; Ex parte Boothe, 64 Ala. 312; Ex parte Williams, 4 Ark. 537, 38 Am. Dec. 46; Mayo v. James, 12 Gratt. 17; Williamson v. Mingo County Court, 56 W. Va. 38, 48 S. E. 835. Such a rule, or an alternative writ, or something equivalent must be issued and served in every case in which the parties do not voluntarily appear, and a failure to make service on respondents necessarily precludes the granting of an absolute writ, and may justify the dismissal of the proceeding: Ex parte Tucker, 25 Ark. 567; State v. Couvillon, 109 La. 267, 33 South. 309; State v. Allen, 24 N. C. 183; Jelly v. Dils, 27 W. Va. 267.

The rule to show cause may be dispensed with when due notice is otherwise given: Ex parte Lyon, 60 Ala. 650.

The time allowed the respondents in which to appear and make their defense is necessarily within the discretion of the court, unless specified by statute, and therefore, where the time for serving the alternative writ is fixed by the court, the service and the subsequent proceedings founded thereon cannot be adjudged void because of the shortness of the notice of the hearing: Jones v. House, 4 Utah, 382, 10 Pac. 843.

We have already seen that when the government is a party to a suit or proceeding against which the prohibition is sought, the judge of the court whose action is sought to be prohibited is the sole defendant or respondent. In several of the states he is also the only respondent though private persons are beneficially interested or are formal parties to the proceedings to be prohibited. Where such is the case, doubtless, for the purposes of jurisdiction, it is sufficient to serve the order to show cause, or the alternative writ, on the judge or court only. The parties interested, though not directly served with anything equivalent to process against them, are usually in some manner notified, and are tendered, and generally assume, the defense of the proceeding.

g. **The Return or Answer.**—In New York, "where the alternative writ has been duly served upon the court or judge and upon the party, the relator is entitled to an absolute writ, unless a return is made by the court or judge or by the party, according to the exigency of the alternative writ, or within such time as may be granted for the purpose. The return must be annexed to a copy of the writ; and it must be duly delivered in open court or filed in the office of the clerk of the county where the writ is returnable. Where the party makes a return, the court or judge must also make a return. In default thereof, the judge or the members of the court may be punished

upon the application of the people and of the relator for a contempt of the court issuing the writ": N. Y. Code Civ. Proc., sec. 2096.

It may be that all the allegations of the affidavit or declaration are true and yet the applicant be not entitled to the writ. If so, it is difficult to conceive why any answer or return should be made. Nor is there good reason why in any other case the respondents should not be able to test the sufficiency of the affidavit or pleading without first tendering some issue of fact. It is said that at the common law he "demurred or pleaded to the declaration": Ex parte Williams, 4 Ark. 537, 38 Am. Dec. 46. The various American statutes upon the subject generally speak of the return as if it were the only response to be made to the writ or the order to show cause. Nevertheless, it is the constant practice to test the sufficiency of the applicant's pleading either by motion to quash the alternative writ (Ex parte Due, 116 Ala. 491, 23 South. 2; State v. Municipal Court, 26 Minn. 162, 2 N. W. 166; State v. Braun, 31 Wis. 600), or by responses which are demurrers or in the nature of demurrers (Siebe v. Superior Court, 114 Cal. 551, 46 Pac. 456); and, at least where no objection is made to the form of the return, it may, if it merely suggests that the plaintiff's application does not state facts sufficient to warrant the issuance of the writ, "be considered as a declaration upon notice for a peremptory writ of prohibition to which the defendants have answered without raising any issue of fact affecting the substantial rights of the parties": Gates v. McGee, 15 S. Dak. 247, 88 N. W. 115.

Where the writ issues to an officer, he is required to make a return upon which issue is joined, but if issued to the court and a party, he is not required or allowed to make a return, but may be allowed to adopt that of the court: Dayton v. Paine, 13 Minn. 493 (Gil. 454). If no return or answer is made, the case must be heard on the papers of the applicant, and an affidavit filed by the respondent not constituting any part of the recognized return will not be considered: State v. Superior Court, 14 Wash. 203, 44 Pac. 131. Of course, the return, like every other answer, must meet and controvert the material allegations of the applicant's affidavit or other pleading, or, at least, so many of such allegations as may be necessary to undermine his claim for relief. With respect to such of the allegations as are addressed to the issue that the lower court will, if not prohibited, take the action which is sought to be prohibited, the responses of the return must be unequivocal and unconditional: State v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; State v. Superior Court, 3 Wash. 696, 29 Pac. 202.

We do not know that any of the statutes upon the subject in express terms provide for any demurrer to the return or any other mode of questioning its sufficiency. Manifestly, however, if it, if true, still shows no reason why the writ ought not to issue, or if issued, should not be made absolute, there is no need to proceed to

the trial of any issue of fact, and the attention of the court may properly be called to this condition of the pleadings, and this is often done by motion to quash the return: People v. District Court, 23 Colo. 466, 48 Pac. 500; State v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037.

h. The Evidence.—While the issues formed by the application for the writ of prohibition and the return thereto may relate either to the jurisdiction of the lower court or its purpose to take the action sought to be prevented, or to both, but rarely can any issue of fact be presented for trial which does not relate to the jurisdiction of the court. If it or its judge unconditionally denies any intention to take the action suggested by the application, that denial would seem to be conclusive and to necessarily result in the refusal of the writ. There have been cases, however, in which the higher court has not been satisfied with the denial of intention by the judge of the superior court, and has believed, notwithstanding such denial, that all the circumstances surrounding the case left the applicant in peril of being proceeded against under the unauthorized order, and therefore entitled to the protection of a writ of prohibition: State v. Langhorne, 8 Wash. 447, 36 Pac. 438. Issues of fact relating to the jurisdiction of the court are by no means usual, for the contention of the applicant ordinarily is either that the court has no jurisdiction of the subject matter, or, though having jurisdiction of the subject matter, has no authority whatever to take the action complained of and sought to be prevented (McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; State v. Houston, 40 La. Ann. 393, 8 Am. St. Rep. 532, 4 South. 50; State v. Hall, 43 La. Ann. 1059, 10 South. 196); and whether such contention is well founded depends upon the constitution and laws of the state of which all courts must take notice. Where the case respecting which the writ is sought has proceeded to judgment, the jurisdiction of the court can be assailed only on the face of the proceedings, but even then the question may be presented whether this involves a re-examination of the evidence on which the court acted in so far as it relates to jurisdictional matters. "Before judgment, if the court below persists in going on when it should not, the court above can examine not simply the process and pleadings technically of record, but the facts in evidence upon which the action is to be taken." But after judgment, the examination becomes more restricted, and manifestly does not extend to the evidence on which the lower court may have acted and from which it reached the conclusion that it possessed jurisdiction: Ex parte Cooper, 143 U. S. 472, 12 Sup. Ct. Rep. 453, 36 L. ed. 232.

In preceding parts of this note in undertaking to show when the writ of prohibition may and when it may not issue, we have impliedly considered the evidence which may properly be received at the trial of the issues presented on an application for the writ, for, as to those circumstances or conditions which justify the issuing of the writ, it must be that all competent evidence tending to show

their existence is receivable, and as to all other conditions and circumstances all evidence must be rejected. Thus, as mere error and irregularity afford no ground for issuing the writ, evidence tending to establish them must be immaterial. On the other hand, as want of jurisdiction constitutes a sufficient reason for issuing the writ, evidence tending to show such want must always be material, and the only question must respect its competency. If the lower court had not jurisdiction of the subject matter, or, having such jurisdiction, had no authority to do the act against which the writ is sought, that rarely, if ever, presents an issue of fact, but must almost universally be considered as an issue at law. If, however, the jurisdiction of the lower court is assailed on the ground that it threatens to act at a time or place where or when it has no authority to act, or in a proceeding in which its judge is disqualified, or where it has not acquired jurisdiction of the person of the defendant, or after it has by some means lost a jurisdiction it once possessed, in most, if not in all, of these contingencies it may become necessary for the applicant to offer, and the higher court to receive, evidence dehors the record for the purpose of establishing his allegations. Perhaps the only question concerning which doubt can reasonably arise relates to the disproving of the jurisdiction of the lower court when that jurisdiction depends on a question of fact, and upon this subject we have already presented all the authorities coming within our observation: Subdivision V, d.

VII. The Relief Direct and Incidental.

a. The Alternative Writ or Order to Show Cause.—Though the mere filing of the application, or rather of the papers on which it will be made, and giving notice thereof to the judge may not arrest his action or stop all further proceedings (Henry v. Steele, 28 Ark. 455), it is manifest that the writ, if ultimately issued, might prove wholly without benefit to the applicant, if, during the time required for the hearing and decision of his cause, the thing which he sought to prevent might be legally accomplished either in whole or in part. Therefore, the alternative writ suspends all further proceedings and preserves all matters in statu quo: Ex parte Ray, 45 Ala. 15; Havemeyer v. Superior Court, 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650; Lincoln-Lucky M. Co. v. District Court, 7 N. Mex. 486, 38 Pac. 580; Mayo v. James, 12 Gratt. 17. If the action of the lower court "is not completed and ended, its further proceedings may be stayed, and if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone. Happily, there is no foundation for the claim that an inferior court can, by mere haste and precipitancy, defeat the appropriate remedy for excesses of jurisdiction, at least in a case where it may be intercepted before its action is fully completed": Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

b. The Absolute Writ and Its Effect.—While the operation of prohibition is in the main preventive, rather than remedial, it is necessarily remedial in so far as it practically obliterates the judgment, order, or other act against which it is addressed, and deprives of support every act or proceeding dependent upon that which is prohibited. If a party against whom the writ is operative has taken possession of property or acquired any other advantage by virtue of the prohibited action, he must relinquish, and, failing voluntarily to do so, the court granting the writ will take such action as may be found necessary to enable the successful applicant to harvest all the fruits of its decision: Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; Crosby v. Superior Court, 110 Cal. 45, 42 Pac. 460; Fayerweather v. Monson, 61 Conn. 431, 23 Atl. 878; State v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; People v. House, 4 Utah, 369, 10 Pac. 838; State v. Superior Court, 12 Wash. 677, 42 Pac. 123; State v. Moore, 21 Wash. 628, 59 Pac. 487; Bodley v. Archibald, 33 W. Va. 299, 10 S. E. 392; Jones v. Owen, 5 Durn. & L. 669, 18 L. J. Q. B. 8, 13 Jur. 261; Marsden v. Wardle, 3 El. & B. 695, 2 C. L. R. 1707, 23 L. J. Q. B. 263, 18 Jur. 578, 2 Week. Rep. 455. "Here is a clear indication of the extent of the remedial office of the writ. It is primarily and principally preventive—its office is to arrest proceedings; but when a case arises in which there are proceedings to be stayed or prevented, it will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction, the court will afford complete relief. A party will not be compelled to resort to more than one proceeding or more than one court for redress": Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627. Hence, courts frequently, in addition to prohibiting a specified action, impose affirmative directions or commands found essential to adequate relief: People v. District Court, 23 Colo. 466, 48 Pac. 500; State v. Judge of First Dist., 19 La. 167; State v. St. Louis Court of Appeals, 97 Mo. 576, 10 S. W. 874; State v. Superior Court, 12 Wash. 677, 42 Pac. 123. Thus, the lower court may be required to issue all orders necessary to place the applicant in possession of property wrongfully taken from him by its receiver (State v. Superior Court, 12 Wash. 677, 42 Pac. 123); or to transfer the cause to another court (State v. Superior Court, 12 Wash. 677, 42 Pac. 123); or to dismiss a cause upon a nolle prosequi theretofore filed by the district attorney: People v. District Court, 23 Colo. 466, 48 Pac. 500.

Obedience to the writ may be enforced, and disobedience thereto punished, by attachment for contempt: Howard v. Pierce, 38 Mo. 296; State v. Hungerford, 8 Wis. 345. Furthermore, the guilty person or officer may, in what he does after the issuing of the writ, be regarded as a trespasser, and held liable as such: Sere v. Armitage, 9 Mart., O. S., 394, 13 Am. Dec. 311.

EVERETT PRODUCE CO. v. SMITH BROS.

[40 Wash. 566, 82 Pac. 905.]

SALES IN BULK STATUTE—Construction of.—The sale of the horses, harnesses, carriages and other property in a livery stable does not fall within the statute providing that it shall be the duty of every person who shall purchase a stock of goods, wares or merchandise in bulk to demand and receive of the vendor a verified statement of the names and addresses of all his creditors and the amount due, or to become due, to each. (pp. 982, 983.)

William Sheller, for the appellant.

Bell & Austin, for the respondent.

566 DUNBAR, J. On the twelfth day of May, 1903, the appellant recovered judgment in the superior court of Snohomish county against the defendants Smith Brothers, for the sum of four hundred and forty-nine dollars. On the same day it made affidavit for a writ of garnishment against A. C. Goerig, the respondent garnishee in this case. Goerig failed to make any appearance or answer to the writ; default was taken, and judgment rendered against him on the fourth day of June, 1903. On the sixteenth day of June, 1903, the garnishee respondent served upon appellant a notice of hearing, a motion to set aside the judgment obtained against him, and an affidavit in support of said motion. On the twenty-seventh 567 day of June, 1903, the court vacated the judgment against the garnishee, and on the thirtieth day of June his answer as garnishee in the aforesaid matter was filed.

Upon the trial the court found, among other things which are irrelevant to this investigation, that during the year 1902 Smith Brothers, the above-named defendants, owned and operated a livery, feed and boarding stable in the city of Everett, Washington, and became indebted to the plaintiff, appellant here in the sum of four hundred and thirty-two dollars and forty-nine cents, for goods, wares and merchandise sold and furnished to said Smith Brothers and used in running and operating said livery barn, and thereafter the said plaintiff procured a judgment for said sum against the said Smith Brothers, who, at the time of the procurement of said judgment, were insolvent and unable to pay the same; that on or about the twelfth day of December, 1902, Goerig

loaned to the said Smith Brothers the sum of two hundred and ninety dollars; that at said date there was a chattel mortgage upon all the property owned and used by the said Smith Brothers for the sum of three hundred and sixty-two dollars and fifty cents, which was a first and valid lien upon said property; that on or about the sixth day of January, 1903, said Smith Brothers, being unable to pay said Goerig the said sum of two hundred and ninety dollars and to discharge the said chattel mortgage of three hundred and sixty-two dollars and fifty cents, made a bill of sale of all of said livery stock and property to the said Goerig for the consideration of the said two hundred and ninety dollars theretofore loaned to the said Smith Brothers by Goerig, and his assumption and agreement to pay the said chattel mortgage of three hundred and sixty-two dollars and fifty cents, and the interest thereon; and, under and by virtue of said bill of sale, the said Goerig took possession and became the owner of said livery barn and stock; that, after the execution of said bill of sale to Smith Brothers, the plaintiff caused a writ of garnishment to be issued by virtue of said judgment in their favor and against Smith Brothers, and caused the said Goerig to be garnished, and that issues were made upon said garnishment and this trial had; that said property so turned over to said Goerig was of no greater value than seven hundred dollars; that Goerig, at the time of receiving the said bill [568] of sale from Smith Brothers, did not cause the said Smith Brothers, or either of them, to make an affidavit as to the names of, and the amounts due, their creditors, as provided by Laws of 1901, page 222.

As conclusions of law, the court found that the respondent Goerig was entitled to be dismissed out of the action, (1) because he was not a purchaser of the business of Smith Brothers within the sales in bulk law; (2) because he was, at the time of the giving of the bill of sale, a mere creditor of the said firm of Smith Brothers; and that the garnishee defendant was entitled to a judgment for his costs in this action. Certain findings of fact and conclusions of law were proposed by the appellant which the court refused to find. From this judgment this appeal is taken.

The first error assigned is that the court erred in ordering a directed judgment rendered against the garnishee to be vacated and set aside. Without reviewing the showing made by the garnishee defendant in this case, we are satisfied that

the court acted well within its discretion in vacating the judgment. We are also satisfied from a perusal of the record that no error was committed by the court in finding that the property turned over to respondent was of no greater value than seven hundred dollars. This leaves for discussion only the principal contention of whether or not the bill of sale taken by the garnishee defendant Goerig is void under the provisions of chapter 109 of the Laws of 1901, an act to regulate the purchase, sale, transfer and encumbrance of stocks of goods, wares and merchandise in bulk, and prescribing penalties for the violation thereof. Section 1, page 222, of said law provides that, "It shall be the duty of every person who shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, or if the vendor or agent be a corporation, then from the president, vice-president, secretary [569] or managing agent of such corporation, a written statement, sworn to (in form afterward prescribed) of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due or owing, and to become due or owing, by said vendor to each of such creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified by an oath."

Section 2 further provides that, in case such statement under oath is not required and taken, the transfer shall be fraudulent and void. The transfer in this case was of horses, wagons, and harness, which comprised the stock in the livery stable.

The construction of this statute has been before this court frequently, and it is insisted by the appellant here that this cause falls within the decision of this court in Plass v. Morgan, 36 Wash. 160, 78 Pac. 784. In that case it was held that the buying of all the goods, wares and merchandise in a restaurant was a purchase, within the contemplation of the statute just above quoted. It may be a little difficult to distinguish that case from the case at bar, and yet we think that there is in reality a distinction, and that the goods, wares and merchandise necessarily used by a restaurant-keeper can more appropriately be termed a "stock of merchandise," than

the horses and carriages in a livery-stable. It is true that a restaurant-keeper, when he buys a ton of flour, does not buy it for the purpose of selling the article again in the same condition that it was in when he bought it, as does the ordinary merchant; but he does dispose of the same goods in a changed condition, and it is a business which from necessity calls for constant and continued purchases from wholesale dealers. While, on the other hand, there is no sale of horses or carriages contemplated at all in the conducting of a livery business, and the stock, when once obtained, outside of the feed required for feeding the horses, is less mutable. In any event, we do not see our way clear to extend the doctrine [570] announced in Plass v. Morgan, 36 Wash. 160, 78 Pac. 784, which we think would have to be done to maintain appellant's theory in this case.

In a subsequent case, however, viz., Albrecht v. Cudihee, 37 Wash. 206, 79 Pac. 628, the decision announced, it seems to us, clearly covers the case at bar. There it was contended that a cash register kept by Harkins & Webb, saloon-keepers, which was levied upon while in the possession of the purchasers of said business, was property which fell within the provisions of the law in relation to sales in bulk, and that the sale of the said cash register was void by reason of the failure of the purchasers to require the affidavit provided by the law; and this court held that the cash register was not a part of the stock of goods, wares or merchandise in the saloon; citing Van Patten v. Leonard, 55 Iowa, 520, 8 N. W. 334, and Kent v. Liverpool etc. Ins. Co., 26 Ind. 294, 89 Am. Dec. 463. It is insisted by the appellant that that case is not in point, for the reason that it was decided on stipulated facts and on different procedure, and that it can be gathered that had the garnishment procedure been used the case would have been decided differently. We think there is nothing in this assertion, for the same rules of construction would be applied to the statute whether the questions arose under a garnishment proceeding or under an attachment, or a levy on execution. As to the stipulation, that was only as to the value of the cash register, that it was used in making up and keeping the cash of the concern, and that it was not a part of the goods, wares and merchandise kept for sale in the saloon. There is no contention in this case that the property sold to the respondent was kept for sale. So that the stipulated facts in that case do not in any way affect the de-

cision of the court. We think, under the law as announced in that case and to which we feel constrained to adhere, that no error was committed by the court in the conclusions reached.

The judgment is affirmed.

Mount, C. J., Hadley, Fullerton, Rudkin, Root, and Crow, JJ., concur.

Statutes Regulating the Sale of Goods in Bulk are discussed in the note to Block v. Schwartz, 101 Am. St. Rep. 986; and in the subsequent cases of Kohn v. Fishbach, 36 Wash. 69, 104 Am. St. Rep. 941; McKinster v. Sager, 163 Ind. 671, 106 Am. St. Rep. 268.

THORNLEY v. ANDREWS.

[40 Wash. 580, 82 Pac. 899.]

APPEAL AND ERROR—Statement of Facts, Attaching Exhibits to.—If depositions and exhibits are referred to in a statement of facts as having been offered and received in evidence, they may, when such statement is settled and certified by the court, be attached thereto. (p. 984.)

LIMITATION OF ACTIONS as Against Mortgagees.—Where a mortgagor conveys real property, his grantee takes subject to the mortgage, and a statute of limitations does not run against the mortgagee until the mortgage is due and can be foreclosed. (p. 986.)

A MORTGAGE Conveys No Title to Real Estate in Washington. The property mortgaged is merely held as security for the debt. (p. 986.)

MORTGAGEE, Adverse Possession Against, When Begins.—Though as against a mortgagor, adverse possession begins immediately when the adverse claimant takes possession, as against the mortgagee of a recorded mortgage the statute of limitations does not begin to run in favor of such adverse possessor until the mortgage becomes due, but if he is not made a party to a suit to foreclose, he is not affected thereby, nor by a sale under its foreclosure, and as against the purchaser thereat, the adverse possession is to be computed from the time it was actually taken and not from the date when the mortgage became due. (p. 989.)

Ira A. Town, for the appellants.

Thomas D. Hitchcock and Emmett N. Parker, for the respondents.

581 MOUNT, C. J. This action was brought by appellants to recover from respondents a strip of land about two

and one-half feet wide along the north side of lot 8, in block 12, Catlin's addition to Tacoma. The appellants in their complaint alleged that they are the owners of said strip of land by reason of adverse possession for a period of more than ten years prior to July 15, 1903; that on said date the respondents wrongfully and by force dispossessed the appellants to said strip of land, to the damage of appellants in the sum of four hundred dollars. Respondents denied these allegations of the complaint and alleged ownership in themselves. On these issues the cause was tried to the court and a jury. A verdict was rendered in favor of respondents. Appellants prosecute this appeal from a judgment rendered on the verdict.

At the time the proposed statement of facts on appeal was filed and served upon respondents' attorneys, it contained none of the exhibits or depositions in the case. At the time the statement of facts was settled the court, at the request of appellants and over the objections of respondents, attached to the statement all the exhibits and depositions in the case, and thereupon certified the statement of facts as containing all the facts. Respondents now move to strike all the exhibits and the depositions which were not attached to the proposed statement of facts at the time it was served, for the reason that respondents had no notice that appellants would ask the court to attach such exhibits or depositions to the statement of facts. An examination of the proposed statement of facts [582] which was served upon respondents discloses that all the exhibits and depositions which were attached to the statement when it was certified were referred to therein as having been offered and received in evidence and filed in the cause. It was not necessary for the appellants to attach to the proposed statement of facts copies of the exhibits or depositions which were already a part of the record, for the statute, at Ballinger's Code, section 5059, expressly provides that, "Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof." It was only necessary, therefore, for the proposed statement to appropriately refer to such depositions or exhibits. A statement in a proposed statement of facts, to the effect that a certain exhibit or deposition was offered and

received in evidence would be an appropriate reference thereto: Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692. There is no merit in the motion, and it is therefore denied.

Upon the trial of the cause it appeared that lots 7, 8 and 9 of block 12, Catlin's addition to Tacoma, are adjoining lots, lying side by side. Lot 7 is to the north of lot 8, lot 8 is north of lot 9. In the year 1890 all of these lots were owned by R. F. Wells and wife. At that time Wells and wife built two houses upon the lots; one house was built on lots 8 and 9 and the other house was built upon lot 7. In August, 1890, Wells and wife gave a mortgage upon lot 7 to secure a promissory note due August 23, 1893. On November 11, 1890, Wells and wife sold lots 8 and 9 to appellants, who took immediate possession thereof. At the time of the sale of lots 8 and 9 by Wells to appellants the lines of the lots were pointed out as running to certain stakes then existing in the ground. Appellants took possession of all the ground pointed out to them as belonging to lots 8 and 9, which ground [583] included the strip of lot 7 now in dispute. They planted a hedge fence along the line which was pointed out as the line between lots 7 and 8, and continually thereafter until July, 1903, cultivated said strip in lawn, frees, and shrubs.

On November 12, 1890, Wells and wife sold lot 7 to Henry Young and wife, subject to the mortgage above named. In 1895 the mortgage given by Wells and wife was foreclosed against the mortgagors and Young and wife. Appellants, who were at that time in the actual possession of the strip of land in dispute, were not made parties to the foreclosure. In June, 1901, respondents acquired the title obtained on foreclosure, and entered into possession of lot 7 except the strip in dispute. Up to July, 1903, the mortgagors and their grantors, Young and wife and these respondents, acquiesced in the possession held by the appellants. In that month, however, respondents had lot 7 surveyed, when it was discovered that appellants were occupying a strip thereof about two and one-half feet wide along the south side of said lot. Respondents thereupon evicted appellants from said strip, and built a fence upon what they claim is the true line between lots 7 and 8. Appellants thereupon brought this action.

The pertinent question in the case is, Did the period of adverse possession begin to run in favor of appellants from

the time they took possession of the strip of land in question in November, 1890, or did it begin to run only from the time the mortgage made by Wells and wife became due in August, 1893? The trial court was of the opinion that adverse possession began to run from the latter date, and so instructed the jury. The rule seems to be well settled that, where a mortgagor conveys mortgaged real estate, his grantee takes subject to the mortgage, and the statute of limitations does not begin to run against the mortgage until it is due and can be foreclosed: 2 Jones on Mortgages, 1st ed., sec. 1211; Boswell on Limitations, sec. 312; 1 Cyc. 1069, par. 42; 1 Am. & Eng. Ency. of Law, 2d ed., 815.

The reason for this rule is apparent, because the mortgagee [584] is not entitled to possession of the mortgaged premises until the mortgage has been foreclosed. He cannot foreclose until the debt becomes due. In the mean time the mortgagor or his grantees are entitled to the possession of the mortgaged premises. The mortgagee is therefore helpless to enforce his rights against a possessor prior to the maturity of the debt secured by the mortgage. The grantee of the mortgagor, with either actual or constructive notice of the mortgage, is conclusively presumed to stand in the place of the mortgagor, and cannot therefore be said to hold adversely to the mortgagee. If this rule controls the case in hand, then there can be no doubt that the instruction given by the trial court was correct. But in this state a mortgage conveys no title to the real estate. The property mortgaged is held merely as security for the payment of the debt (Hitchcock v. Nixon, 16 Wash. 281, 47 Pac. 412; Dane v. Daniel, 23 Wash. 379, 63 Pac. 268; Fisher v. Woodruff, 25 Wash. 67, 87 Am. St. Rep. 742, 64 Pac. 923), and ceases to be a lien upon the real estate after six years from its maturity, when no payments have been made and no action to foreclose the lien had been commenced within that time: Ballinger's Code, sec. 4978; Damon v. Leque, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485; Dane v. Daniel, 23 Wash. 379, 63 Pac. 268; Krutz v. Gardner, 25 Wash. 396, 35 Pac. 771; George v. Butler, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, 57 L. R. A. 396; Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271; De Voe v. Rundle, 33 Wash. 604, 74 Pac. 836.

The mortgagee is not entitled to possession and cannot maintain ejectment under his mortgage: Ballinger's Code,

sec. 5516. One in possession of real estate, under claim of right from a mortgagor, is a necessary party to a foreclosure of the mortgage, and a decree of foreclosure is not effective as to him: Ballinger's Code, sec. 4833; 9 Ency. of Pl. & Pr. 305; 2 Jones on Mortgages, 6th ed., sec. 1406; Denny v. Cole, 22 Wash. 372, 79 Am. St. Rep. 940, 61 Pac. 38. The rule also is that, "a title acquired by adverse possession is a title in fee simple, and is as perfect a title as one by deed from the original owner or by [585] patent or grant from the government": 1 Cyc. 1135b, and cases cited; 1 Am. & Eng. Ency. of Law, 2d ed., 883, and cases cited.

Under the rule that the grantee of a mortgagor is in permissive possession of the mortgaged premises, and does not hold adversely as to the mortgagee, but stands in the same position as the mortgagor, the appellants in this case did not hold adversely to the mortgagee until the time when the mortgage became due and could be foreclosed. The possession of the appellants was the same as the possession of the mortgagor would have been had he retained possession, and had the mortgage not been foreclosed against him. The statute of limitations began to run against the mortgage lien when the mortgage became due. If the lien had not been foreclosed against anyone until the expiration of six years after the note became due, no payments having been made thereon, the mortgage lien could not have been foreclosed at all. It would, in that event, have ceased to be a lien; assuming, of course, that the mortgagee or his assigns had remained out of possession of the mortgaged property. In that event, it could not be reasonably claimed that adverse possession did not run against the legal title, merely because a mortgage had existed upon the property for a term of years and had been permitted to expire by limitation. In short, as against the mortgagor, adverse possession began immediately at the time appellants took possession; as against the mortgagee holding a mortgage made and recorded at the time of taking possession, the statute of limitations did not begin to run until the mortgage became due.

When the mortgage was foreclosed against the mortgagor, Wells and wife and Young and wife, holding the record title, appellants were not made parties to the foreclosure. Their interest in the land was, therefore, not affected by the foreclosure, which was a nullity as to them. It was good as to all parties served or appearing in the action, and the foreclosure

and sale vested all the interest of the parties, legal and equitable, [586] in the purchaser at the sale, subject to redemption under the statute. If appellants in possession of the strip of land in question had been made parties to that foreclosure, their interests, acquired by purchase, by adverse possession, or in any other way, from the mortgagor or persons holding the legal title, would have become vested in the purchaser at the foreclosure sale. Whatever previous rights existed in favor of appellants would have been terminated at that time, and whether possession was taken or not by the purchaser at the foreclosure sale, adverse possession as to such purchaser could only run from the time of the sale. But since the appellants were not made parties to the foreclosure proceedings, such proceedings were not effective as to them, and they continued to hold possession and the right of possession the same as though the mortgage had not been foreclosed. Their interest was not foreclosed.

If, instead of the foreclosure, the mortgagor and his grantees, Young and wife, in the year 1895, at the time of the foreclosure, had given a deed of the whole of lot 7 to the mortgagee, and the mortgagee and his grantors had permitted the appellants to remain in possession adversely for the period of ten years from the time they first acquired possession, it could not then be claimed that the possession of the appellants had been held adversely only from the time the mortgage became due; because, in that event, the title acquired by the deed would have been subject to all rights against Wells and wife and Young and wife, notwithstanding the mortgage lien. In order to extinguish these rights, it would have been necessary to foreclose the lien of the mortgage against all subsequent holders of the legal title and actual possessors, notwithstanding the deed. Since the appellants were not made parties to this foreclosure, the purchaser at the foreclosure sale and their grantors held only a mortgage lien against the strip in the possession of respondents, and are therefore under the statute not entitled to the possession until the lien is [587] foreclosed. They cannot maintain an action for possession until they have foreclosed the lien against the possessor.

At the time respondents dispossessed appellants, the ten year period of adverse possession had fully run in favor of appellants against all persons having title, and the legal title was therefore perfect in appellants. At that time, also, the

statute of limitations had run against the right to foreclose the mortgage as against the appellants. Their rights were therefore unaffected by the mortgage. If Wells and wife had not given the mortgage, and appellants had been permitted to hold possession as they have done for thirteen years, neither Wells and wife nor their grantees could now claim that appellants had not acquired a perfect title to the land in question by adverse possession. The fact that the mortgage lien has been permitted to expire by limitations as to the appellants places them in the same position as though the mortgage had never been given. It follows that the period of adverse possession in this case began to run from the time appellants took possession of the land in question, and that the lower court erred in instructing the jury that it began from the time the mortgage became due.

The judgment must, therefore, be reversed, and the cause remanded for further proceedings in accord with this opinion.

Dunbar, Fullerton, Rudkin, Crow, and Hadley, JJ., concur.

Where a Mortgagor Conveys the property to a third person, the grantee's possession will not be deemed adverse to the mortgagee, unless there is an explicit disclaimer of holding under him and an assertion of title in the grantee: Whittington v. Flint, 43 Ark. 504, 51 Am. Rep. 572. See, too, Newman v. Chapman, 2 Rand. 93, 14 Am. Dec. 766. The possession of the grantee is in subordination to the title of the mortgagee to the same extent as that of the grantor, and it cannot cease to be of that character until there is an open assertion of a distinct title with the knowledge of the mortgagee: Alsup v. Stewart, 194 Ill. 595, 88 Am. St. Rep. 169. Possession by a mortgagor or his grantee is not adverse so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties: Lewis v. Schwenn, 93 Mo. 26, 3 Am. St. Rep. 511.

FIREBAUGH v. SEATTLE ELECTRIC COMPANY.

[40 Wash. 658, 82 Pac. 995.]

CARRIERS.—The Rule of Res Ipsa Loquitur is Based on the apparent fact that the accident could not have happened without negligence on the part of the carrier; or, upon the literal meaning of the expression, that the thing itself speaks, and shows prima facie that the carrier was negligent. (pp. 991, 992.)

STREET RAILWAYS, Negligence, Presumption of from Accident.—When the controller of a street-car blows out or burns out, the law presumes that such blowing or burning out resulted from some defect of the controller or other appliance of the carrier or means used by the company in its operation, and it devolves on the company to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented. (p. 995.)

NEGLIGENCE.—The Action of a Passenger Placed in Sudden Apparent Peril does not forfeit or change his right to rely on the presumption that the accident to which the apparent peril was due arose from the negligence of the carrier. (pp. 995, 996.)

NEGLIGENCE, Presumption of from Accident, When not Rebutted.—In an action against a street railway corporation, the testimony of witnesses that they did not know what caused the controller to blow out or explode, and that a blowing out will sometimes occur, the cause of which could not be ascertained, does not rebut the presumption of the negligence of the corporation, especially where there is testimony of different causes for the explosion which might have been controlled or remedied by the corporation. Under these circumstances, it is for the jury to determine whether the presumption of negligence has been rebutted. (p. 996.)

Hughes, McMicken, Dovell & Ramsey, for the appellant.

Brady & Gay, for the respondent.

660 DUNBAR, J. The action was brought by the respondent to recover damages for personal injuries, sustained by jumping from a front platform of a street-car operated by the appellant company, and on which he was a passenger. The complaint alleges, among other things, that the defendant carelessly and negligently used the said car when it was out of repair in its motor-power and in its appliances appertaining thereto; that while the plaintiff was such passenger on said car, by reason of defendant's negligence, the controller, machinery and appliances of said car exploded, and filled the vestibule thereof with smoke and flames, to such an extent that all the front portions of said car became greatly heated; that by reason thereof the plaintiff was placed in a situation of apparent and imminent peril, and was dominated by the peril of impending danger, and be-

lieved that the only way he could save himself was to jump from said car; and without time to deliberate, and acting on the instinct of self-preservation, did jump and was thrown against hard substances beside the track, and thereby injured.

The defendant, in its answer, admitted that the plaintiff was a passenger, and that he did jump from the car at the time and place alleged, but denied every allegation of negligence on its part, and pleaded affirmatively contributory negligence on the part of the plaintiff in carelessly and negligently jumping, or climbing over the gate on the platform of its car while the same was closed. The reply denied contributory negligence. The case was tried to a jury, which resulted in a verdict for the plaintiff. Judgment followed, and this appeal is taken therefrom.

There are but two assignments of error, the first that the court erred in giving instruction No. 5, which was as follows: "When a controller upon a car of a street railway company blows out or burns out, the law presumes that such blowing or burning resulted from some defect of the controller or other appliances of the car, or means used by the 661 company in the operation of the car, and in such a case it devolves upon the company to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented." Assignment 2 is that the court erred in denying defendant's challenge to the legal sufficiency of the evidence, and in refusing to instruct the jury to return a verdict for the defendant. The allegation of contributory negligence raised in the answer is not urged here.

It is contended by the learned counsel for appellant that the doctrine of res ipsa loquitur does not apply in a case of this kind, and that it was improper in this case to tell the jury that they were entitled to find the appellant negligent upon proof of the accident alone; and the case of Allen v. Northern Pac. R. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804, is cited in support of the contention that the doctrine of res ipsa loquitur has been somewhat modified by this court. It is insisted by the appellant that it is manifest that this court has not intended to announce the rule that there is a presumption of negligence unless it is apparent that the accident could not have happened without negligence on the part of the carrier. This is no doubt true, for the rule of res ipsa loquitur is based upon the apparent fact that the accident

could not have happened without negligence on the part of the carrier; or, upon the literal meaning of the expression, that the thing itself speaks, and shows prima facie that the carrier was negligent.

The cases which we will hereafter cite do not in any way contradict the further contention of the appellant that a careful analysis of the better considered decisions shows that negligence will not be presumed from the mere fact of accident which is as consistent with the presumption that it was unavoidable as it is with negligence; and, therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God or unknown causes [662] as to negligence, there is no such presumption. As we have said, this does not affect the principle of law that when, by reason of the machinery and appliances used by the common carrier, wholly under its control, a passenger is injured, this fact shows prima facie negligence on the part of the carrier. Looking to eminent authority for expression on this subject, we find the following announcement in Nellis on Street Railroad Accident Law, pages 590, 591: "Where the plaintiff is a passenger on a street-car, a prima facie case of negligence is made out by showing the happening of the accident during the course of transportation; and if the injury was caused by apparatus wholly under its control, furnished and applied by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence." The same rule is substantially laid down by Shearman and Redfield on the Law of Negligence, and by all other authority.

In Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 Sup. Ct. Rep. 859, 35 L. ed. 458, which was an action for damages caused by a land slide in a railway cut, the doctrine of res ipsa loquitur was applied, and the court announced the rule as follows: "Since the decisions in Stokes v. Salstonstall, 13 Pet. 181, 10 L. ed. 115, and Railroad Co. v. Pollard, 22 Wall. 341, 29 L. ed. 877, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general accept-

ance; and was followed at the present term in Inland etc. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. Rep. 653, 35 L. ed. 270."

In answer to the contention of the carrier in that case, to the effect that the operation of the rule was confined to cases where the accident resulted from defective arrangement, management [663] or misconstruction of things over which the defendant had immediate control, etc., the court said: "Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control, and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of the exculpation, whether disclosed by the one party or the other. They are its matter of defense." So that it will be seen that the court in that case went further than it is necessary to go here, because the fact is undisputed in this case that the accident was caused by appliances over which the appellant had absolute control.

This broad announcement, however, has been somewhat modified by this court in Hawkins v. Front St. Cable R. Co., 3 Wash. 592, 28 Am. St Rep. 72, 28 Pac. 1021, 16 L. R. A. 808, where it was held that the statement that, where a passenger was being carried on a train and was injured without fault of his own, there was legal presumption of negligence, casting upon the carrier the burden of disproving it, was too broad. But that was upon the express ground that the nature of the accident was not such as to warrant saying anything about the machinery, the case being an accident caused to the passenger while occupying a seat upon the dummy car of a cable railway, by reason of a collision between the dummy and a wagon which was on the track. But the rule announced in Federal Street etc. R. Co. v. Gib-

son, [664] 96 Pa. St. 83, was indorsed in that case as being the proper rule, and there it was said: "It is true, in many cases, the mere fact of injury to a passenger raises the presumption of want of care on the part of the railroad company. Such is the case when the injury results from defective track, cars, machinery or motive power."

The whole case conclusively shows that there was no attempt to disturb the well-settled rule that, where the accident was caused by machinery or equipment over which the carrier had absolute control, the presumption of negligence on the part of the carrier would attach. And no further modification was intended by this court in Allen v. Northern Pac. R. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804. The court there quoted approvingly from Elliott on Railroads, volume 4, section 1644, which is as follows: "It is, therefore, too broad a statement of the rule to say that, in all cases, a presumption of negligence on the part of the carrier arises from the mere happening of the accident or an injury to a passenger regardless of the circumstances and nature of the accident. The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company had entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury."

It would seem that this case falls squarely within the announcement there made. The accident was unquestionably caused by something in connection with the equipment or operation of the road over which the company had entire control, and it is not contended that there was contributory negligence on the part of the passenger. It follows, then, from [665] the announcement of Mr. Elliott quoted, and which is also cited by the appellant in this case, that the presumption of negligence on the part of the company arises from such facts, and this is all that is stated by the instruction complained of. The modification in all the cases mentioned is simply to the extent that it is not sufficient to make the bare allegation that the plaintiff was a passenger on the de-

fendant's cars and that an accident occurred by reason of which he was injured, or to rely upon such proof, or to give such an instruction, because manifestly many accidents might occur to a passenger on a train the cause of which could not to any extent be attributed to the negligence of the carrier.

This question has again lately been before this court, and the authorities generally reviewed, in the case of Williams v. Spokane Falls etc. R. Co., 39 Wash. 77, 80 Pac. 1100, where it was held that evidence that the injury of a passenger was connected with the operation of a railroad makes it a prima facie case of negligence, devolving on the carrier the duty of overcoming the presumption. And the distinction was shown there between instructions which were absolutely unlimited in their scope, and which might lead the jury to believe that even the proof of an accident caused by some agency which was not connected with the operation of the road would make a prima facie case of negligence on the part of the carrier, and an instruction which applied to accidents occurring by reason of something connected entirely with the operation of the road; citing Thompson's Commentaries on the Law of Negligence, volume 3, section 2754, where these distinctions are plainly set forth. It is true that this case is now pending in this court on a petition for rehearing, but the petition does not raise any of the questions involved in the case at bar. We think that, if the doctrine of res ipsa loquitur could be applied in any case of accident between a passenger and a common carrier, it would naturally apply in this case.

The appellant, however, insists that, even if under the general [666] rule it should apply, it cannot apply under the circumstances of this case, because the respondent was not relying upon the operation of the car by the appellant, and was therefore not a passive recipient; and the presumption of negligence could not obtain because he acted himself, and to a certain extent took the matter into his own hands by jumping from the car; and some cases are cited in support of this contention. We think, upon an examination of the cases, that they do not in any manner sustain appellant's contention, and that, when it is conceded, as it must be from an examination of the testimony in this case, that the plaintiff was warranted in retreating from the peril which threatened him, and when in fact he would have been guilty of

contributory negligence if he had not attempted to save himself by retreating, there is no equitable rule which could deprive him, by reason of such cautionary action on his part, from pleading negligence on the part of the carrier.

It is further earnestly contended by the appellant that, in any event, it was shown by the appellant that there was no negligence on the part of the carrier, and that the court should have sustained the challenge as to the legal sufficiency of the evidence. An examination of this testimony satisfies us that it was not proven that the cause of the blow-out of the controller was beyond appellant's control. It was simply shown by the witnesses who testified that they did not know what the cause was, and that sometimes a blow-out would occur and the cause could not be ascertained. There is in science a cause for everything. But, outside of this, there was testimony offered by the respondent showing different causes for the explosion which might have been controlled and remedied by the appellant; and under the testimony, it was a question for the jury to determine whether the appellant rebutted the presumption of negligence which, under the law, attached to it by reason of the accident occurring. This question having been submitted to the jury under proper instructions, [667] we are unable to find any error in the record, and the judgment is affirmed.

Mount, C. J., Rudkin, Fullerton, Hadley, Crow, and Root, JJ., concur.

A Presumption of Negligence may arise against a street railway company from the occurrence of an accident resulting in injury to a passenger, as where a car stops abruptly causing injury to a passenger sitting in a seat: Redmon v. Metropolitan St. Ry. Co., 185 Mo. 1, 105 Am. St. Rep. 558.

Although a Street Railway company is careless with respect to an electric wire, it is not necessarily liable to a passenger whose injuries are due to his acting rashly under the circumstances and in a manner not justified by the reasonable apprehension from the surrounding circumstances that he was in danger: Chretien v. New Orleans Ry. Co., 113 La. 761, 104 Am. St. Rep. 519. But see the note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 536.

PLUMMER v. ILSE.

[41 Wash. 5, 82 Pac. 1009.]

MORTGAGE OR DEED.—In Determining Whether a Deed is a Mortgage, the Principal Test to be applied is whether the relation of the parties toward each other of debtor and creditor continued after the execution of the deed. (p. 999.)

MORTGAGE.—Once a Mortgage Always a Mortgage is a well-established rule of equity. A deed intended as a mortgage will remain a mortgage until the equity of redemption is cut off, and the parties cannot by stipulation, however express or positive, render it anything else. (p. 1000.)

MORTGAGE—Right of Redemption cannot be Cut Off by Default.—It is impossible in equity for the contracting parties in a single transaction by the execution of one or more written instruments to create the relation of debtor and creditor and mortgagor and mortgagee, and at the same time to provide for a conditional sale or the destruction of the mortgagor's right of redemption on default. (p. 1001.)

MORTGAGE Accompanied by a Deed in Escrow.— If, when a loan is secured, a promissory note is given therefor and a mortgage to secure its payment, and a deed is also executed by the mortgagor and given to a third person, to be delivered to the mortgagee in case default should be made in the payment of the note when due, and default being made, such deed is delivered accordingly, the whole transaction amounts to a mortgage only, and the mortgagor's right of redemption is not cut off by the delivery of such deed. (p. 1003.)

L. H. Prather, for the appellants.

Peacock, Wells & Ludden, for the respondent.

[6] CROW, J. This action was commenced by appellants, J. W. Plummer and Amanda Scofield, against respondent, George Ilse, for the purpose of having a certain warranty deed adjudged to be a mortgage, and for the purpose of making redemption. From a judgment of dismissal, this appeal has been taken.

No statement of facts has been certified, but this appeal is prosecuted on findings made by the trial judge, which appellants contend do not support the final judgment, but authorize a decree in their favor. It is not necessary to copy such findings at length in this opinion. From them it appears that on May 2, 1904, appellant Amanda Scofield being indebted for five hundred dollars, balance of purchase money then due on section 13, township 39 north of range 42 east, W. M., in Spokane county, she and appellant J. W. Plummer borrowed of respondent George Ilse said sum of five hundred dollars to pay the same, and executed and de-

livered to respondent their promissory note of that date for said sum, payable in six months, with interest from date at the rate of one per cent per month; that, to secure the payment of said note, appellants executed and delivered to respondent their certain mortgage deed, of even date therewith, the same being in ordinary form, and containing conditions for foreclosure and sale for nonpayment and for the application of the proceeds of such sale to the discharge of the indebtedness arising on said note, and to disbursements and costs, including an attorney's fee of one hundred dollars; that at the time of the execution and delivery of said note and mortgage, appellants also made and executed their certain warranty deed for said land to respondent, and placed the same in escrow with one J. W. Graves, agent of appellants and also of respondent, with instructions that, in the event appellants should make default on said note according to the conditions of said note and [7] mortgage, said deed was to be delivered to respondent in full payment and satisfaction, to save appellants from further costs and attorney's fees on foreclosure, it being understood that respondent should accept said deed; that after the execution of said note and mortgage said J. W. Graves, who acted as agent for all the parties in negotiating said loan, informed appellants that respondent would not make said loan unless appellants would also execute said deed and deliver the same to said Graves; that thereupon said note, mortgage and deed were delivered to said Graves, who forthwith paid to appellants said five hundred dollars, borrowed from respondent; that at the time of said delivery of said instruments to said Graves he, the said Graves, signed and delivered to appellants a written instrument reading as follows: "I hereby agree to hold the deed until the note and mortgage shall become due and past due and then the deed shall be delivered to the mortgagee"; that appellants made default on said note when the same became due; that said deed was then delivered to and accepted by respondent, in full satisfaction of said note and mortgage, and of all costs, attorney's fees and charges due respondent; that at the time of the delivery of said deed respondent delivered to said Graves a release of said mortgage, together with said mortgage and the note thereby secured; that prior to the delivery of said deed said Graves informed appellants that, unless said mortgage was promptly paid when due, he would be

compelled to deliver said deed to respondent, who had also informed appellants that said five hundred dollars and interest would have to be promptly paid when due; that said deed was not at any time in the possession of respondent until delivered by said Graves after the maturity of said note; that said deed was placed in escrow with said Graves, with full knowledge and understanding by appellants that the same was an absolute warranty deed, and that the same should be delivered to respondent on default in payment, and would convey a fee simple title; that respondent [8] received said deed in full settlement and satisfaction of said note and mortgage, and of all costs, charges, interest, taxes and attorney's fees, and is now the owner of said real estate in fee simple; that on November 14, 1904, appellant Plummer, for himself and for said appellant Scofield, went to respondent's place of business for the purpose of paying said loan, and with sufficient money to pay the same, but respondent was absent therefrom, and appellant could not then make any tender, and that on said November 14, 1904, respondent, claiming said deed to be an absolute conveyance, placed the same of record. Other facts were found, but we have stated all that are material to the determination of the only question involved, viz., whether said deed was a mortgage or an absolute conveyance of the fee simple title.

The first question to be determined is, What relations existed between appellants and respondent at the date of the completion of the original transaction, and as the result thereof? It appears that the giving of the note and mortgage, and the execution of the deed, and the placing of the deed in escrow, were one transaction. There is no question but that an interest-bearing loan was then made, and that the relation of debtor and creditor and also mortgagor and mortgagee then existed between the parties, and continued to exist for the period of at least six months thereafter. True, the deed absolute in form was executed and placed in escrow, but we do not think this changed the relation of the parties from that of mortgagor and mortgagee to that of vendor and vendee. The deed must be construed to have been, at the time of its execution, either a mortgage or a conveyance making a conditional sale, according to all the surrounding facts and circumstances, as they then existed. In deciding whether it was a mortgage, the principal to be applied is, whether the relation of the parties toward each other of debtor and

creditor continued after the execution of the deed: 20 Am. & Eng. Ency. of Law, 2d ed., 940. In McNamara v. Culver, [9] 22 Kan. 661, the court, speaking through Brewer, J., now a member of the supreme court of the United States, said: "The test is the existence or nonexistence of a debt. And equity looks behind the form to the fact. If the transaction was intended as a loan, if there remains a debt for which the conveyance is only a security, and the collection of which may be enforced independent of the security, equity will hold it a mortgage, no matter whether the transaction is evidenced by one or two instruments." Applying this test, the deed executed by appellants must be held to have been a mortgage. Did it at any subsequent time cease to be a mortgage and become an absolute conveyance of the fee simple title? "Once a mortgage, always a mortgage," is a well-established rule in equity. A deed intended as a mortgage will remain a mortgage until the equity of redemption is cut off, and the parties cannot by stipulation, however express or positive, render it anything else: 4 Current Law, 683; Pingrey on Mortgages, sec. 87; 1 Jones on Mortgages, 6th ed., sec. 340.

"The doctrine has been firmly established from an early day that when the character of a mortgage has attached at the commencement of the transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right": Pomeroy on Equity Jurisprudence, 2d ed., sec. 1193.

[10] It appears that appellants owed to others not parties here some unpaid purchase money, and that they desired to, and

did, effect a loan to pay the same; that respondent, as a condition for making such loan and taking their note and mortgage, at the time insisted on the deed being placed in escrow. If he did not make a loan, but was purchasing the real estate, why did he take the note and mortgage? The only possible answer is that it was his intention to take a note and mortgage as evidence of, and security for, the loan, and at the same time, and as a part of the same transaction, to enter into some simultaneous agreement that would have the effect of destroying or cutting off the mortgagor's equitable right of redemption. In 2 Washburn on Real Property, sixth edition, section 998, the text reads as follows: "If the transaction between the parties be in fact a mortgage, its character cannot be affected or changed by any agreement entered into at the time between them as to redemption or the other incidents of a mortgage. The right of redemption attaches as an inseparable incident created by law, and cannot be waived by agreement. A mortgage, moreover, depends for its vitality upon the law in force at the time of its execution. The doctrine universally applicable is, if once a mortgage, always a mortgage. Nor can it be made otherwise by any agreement of the parties made at the time of the execution of the deed, nor upon any contingency whatever. Equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan."

Equity regards it as impossible for contracting parties, in a single transaction, by the execution of one or more written instruments, to create the relation of debtor and creditor or mortgagor and mortgagee, and at the same time to provide for a conditional sale, or the destruction of the mortgagor's right to redeem after default. The deed having been a mortgage in its inception, appellants are still possessed of their equitable right to redeem, unless such right has been terminated [11] either by foreclosure or some subsequent and independent valid agreement between the parties, neither of which has occurred.

Respondent contends that the findings of the trial court show the deed was not a mortgage, but was intended by the parties to become absolute in the event of nonpayment of the debt, and contends that such finding sustains the final judgment herein. It is true that substantially such a finding was

made, but we think it can have no controlling effect here, for the reasons (1) that it is more in the nature of a conclusion of law than a finding of fact; and (2) that, even though it be a finding of fact, it is inconsistent with other facts necessarily found, from the nature and terms of the several instruments executed. In 2 Washburn on Real Property, sixth edition, section 990, the author uses the following language: "On the other hand, if the transaction of the parties actually constitutes a mortgage in terms, it will have that effect, though not so intended by them when it was done. Thus, where one made a deed, and the grantee gave back a bond to reconvey on certain conditions, it was held that, though not intended thereby to create a mortgage, it was one in fact."

Where the transactions actually occurring between the parties are clearly of such a nature as to show a deed absolute in form to have been a mortgage, courts of equity will construe it as such, even though the parties may have apparently intended otherwise. The reason of this rule is that courts of equity are ever zealous to preserve to a mortgagor his equitable right of redemption, and to prevent him from entering into any agreement at the time of the execution of the original mortgage having the effect of nullifying such right. If the mortgage exists, the equity of redemption necessarily exists as incidental thereto. Therefore, in passing upon the facts found, we must, in applying these equitable principles, hold the deed to have been a mortgage, although there may have been some seeming intention on the part of [12] one or both of the contracting parties that it should be otherwise considered.

Respondent has cited a number of authorities to support his contention that the deed was in fact an absolute conveyance; but in all of his citations it appears from the facts involved either (1) that, at the time of the execution of the deed, a previous contractual relation of mortgagor and mortgagee, or creditor and debtor, antedating the deed, had existed between the parties and was then terminated; or (2) that, at the time of the execution of the deed, no loan was made by the grantee to the grantor, nor did the relation of debtor and creditor arise between them. The case at bar does not comply with either of these conditions, and we have been unable to find any authority which would justify us in holding the deed here given as a part of the original transaction

to be other than a mortgage; nor have counsel cited us to any authority which would warrant such holding.

The honorable trial court erred in holding the deed to have been an absolute conveyance. The judgment is reversed, and the cause remanded with instructions to enter a decree adjudging the deed to be a mortgage. Further proceedings will also be taken by the superior court for the purpose of ascertaining the amount due upon said mortgage, and necessary to be paid by appellants on redemption.

Mount, C. J., Root, Dunbar, Hadley, Fullerton, and Rudkin, JJ., concur.

The Mere Form of an Instrument cuts very little figure in respect to whether it is enforceable as a mortgage or not, upon its character being questioned in either a legal or an equitable action. If its purpose is security, and this is established in any action involving the subject, the instrument is treated as a mortgage and nothing else: Smith v. Pfluger, 126 Wis. 253, 110 Am. St. Rep. 911.

Contracts Between Mortgagor and Mortgagee to waive or release the equity of redemption, whether made contemporaneously with the execution of the mortgage or subsequently, are considered in the monographic note to Bradbury v. Davenport, 55 Am. St. Rep. 100-111. A stipulation in a defeasance that the time of payment is of the essence of the contract, and that in case of failure therein the intervention of equity is forever barred, does not prevent the deed and defeasance from operating as a mortgage, nor forfeit the equity of redemption if payment is not made when stipulated: Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160.

GRANTHAM v. GIBSON.

[41 Wash. 125, 83 Pac. 14.]

INJUNCTION, Complaint, When Sufficient for, Though the Amount of Damages is not Stated.—Though the complaint does not state that the complainant has suffered damages in any specific amount, it will sustain an injunction against the continuance of an alleged nuisance, if it shows that such continuance will work serious and irreparable injury to the plaintiff's business, as that, being the keeper of a hotel, the acts complained of, consisting of the operation of a shooting-gallery and certain musical instruments, have driven away several of his patrons, and, if continued, will drive away the remainder. (p. 1005.)

NUISANCE—Holder of Leasehold Interest, Whether Entitled to Injunction.—One who is the holder of a leasehold interest only is entitled to an injunction to restrain the continuance of a nuisance if it works an injury to his business as lessee and not an injury to

the freehold, and an action for damages would not afford adequate relief. (p. 1005.)

INJUNCTION, When Will not be Set Aside Because Too Sweeping.—An order directing the issuing of a temporary injunction will not be reversed as too sweeping, if that question was not presented in the trial court, and the only claim made there was that an injunction should not issue at all. (p. 1005.)

NUISANCE.—The Operation of a Shooting-gallery and a Tonophone and an Orchestrion constitutes a nuisance which will be restrained at the instance of a hotel-keeper if it has driven away several of his guests, and, if continued, will drive away the balance. (pp. 1005, 1006.)

Williamson & Williamson and J. W. A. Nichols, for the appellants.

Harry H. Johnston, for the respondent.

126 FULLERTON, J. The respondent brought this action against the appellants to enjoin them from operating, in connection with their business, a shooting-gallery and two certain musical instruments known respectively as a "tonophone" and an "orchestrion," alleging that their operation constituted a public nuisance specially injurious to himself. At the commencement of his action the respondent applied for a temporary injunction restraining the appellants from operating the shooting-gallery and the musical instruments until the rights of the parties could be determined by a trial upon the merits. Notice of the application was duly given and a hearing was had thereon, at which hearing the court granted the temporary injunction applied for. This appeal is from that order.

The appellants first attack the sufficiency of the complaint. It is contended that because the respondent neither alleged that he had suffered damages in any specific sum, nor demanded judgment for damages in any specific sum, in his complaint, the same is fatally defective, and insufficient to support a judgment or order of any kind. But we think the complaint sufficient to sustain an order for a temporary injunction. Aside from the fact that an injunction may be sued out to restrain the erection or creation of a merely threatened nuisance, there is in this complaint an allegation of substantial injuries, as well as a showing that the continuance of the acts complained of will work serious and irreparable injury to the respondent's business. It is alleged that the appellants and respondent are tenants in the same building; that the appellants exhibit pictorial views,

enlarged and made attractive by electrical devices; that the respondent conducts a hotel and lodging-house, and was first in the order of time, that the installation of these musical instruments and the shooting-gallery by the appellants have already driven away some fourteen of his patrons, and will, if not abated, drive away the remainder and prevent him from obtaining others, to the ruin of his theretofore profitable [127] business. These allegations, we think, show not only substantial damages already suffered, but that the respondent will continue to suffer substantial damages so long as these mechanisms are operated by the appellants.

It is next said that because the respondent has only a leasehold interest in the property his remedy lies in an action of damages for the wrongs done him, as no one but the owner of the fee can maintain a suit to enjoin the continuance of a nuisance. Were the nuisance complained of merely an injury to the freehold, it may be that this contention could be maintained, but here the nuisance alleged is one that works an injury to the business of the lessee, not an injury to the freehold, and his right to maintain an injunction must be determined by the character of the injury done him, and the effectiveness of his remedies at law, not upon the title by which he holds the property in which he conducts the business injured. The allegations of the complaint show that an action of damages would afford inadequate relief, and this is the measure of the complainant's right to maintain an action of injunction.

It is next complained that the injunction is too sweeping, in that it enjoins the appellants from operating the shooting-gallery and musical instruments at all times, while it does not appear that the operation in certain parts of the day would seriously interfere with the respondent's business. But this question seems not to have been suggested in the trial court. There the contest was over the right of the respondent to an injunction at all, and the court was not asked to limit the operation of the injunction to certain parts of the day. For the reason that it was not suggested below, it will not be determined here.

Lastly, the appellants contend that the evidence was insufficient to justify the order. On this question we think there can be but little doubt. Manifestly the operation of the contrivances complained of at the place where the appellants operated them constituted a nuisance specially in-

jurious [128] to the respondent. He was, therefore, entitled to have their operation enjoined, and the court did not err in so holding.

The order appealed from is affirmed.

Mount, C. J., Hadley, Rudkin, Crow, Root, and Dunbar, JJ., concur.

What are Public Nuisances is the subject of a monographic note to Acme Fertilizer Co. v. State, 107 Am. St. Rep. 195-252.

A Tenant may Recover damages for an injury to his use of the premises occasioned by a nuisance: Bentley v. Atlanta, 92 Ga. 623, 18 S. E. 1013; or he may, in a proper case, have the maintenance of the nuisance enjoined: State v. King, 46 La. Ann. 78, 14 South. 423.

WHELAN v. WASHINGTON LUMBER COMPANY.

[41 Wash. 153, 83 Pac. 98.]

MASTER AND SERVANT, Provisions of Statute in Favor of the Latter, When cannot be Waived.—If a statute provides that every person operating a factory where machinery is used shall provide and maintain in use proper belt shifters or other contrivances for the purpose of throwing on or off belts on pulleys, an operative working in the factory, with knowledge that such shifters have not been procured and are not in use, does not assume the risk of their absence. He cannot waive this provision of the statute intended for his protection. (p. 1008.)

NEGLIGENCE in Failing to Perform Duty Imposed by Statute. The owner of a factory who fails to comply with the provisions of a statute requiring him to provide and maintain in use belt shifters is guilty of negligence per se. (p. 1008.)

STATUTES—Factory Act—Belt Shifters.—A statute requiring the owners of factories to establish and maintain in use proper belt shifters or other mechanical devices for throwing on and off belts on pulleys requires such shifters in all cases, and the question should rarely, if ever, be left to the jury to determine whether such a shifter was a necessary and practicable device at the place in question. (p. 1009.)

MASTER AND SERVANT—Belt Shifters, Assuming Risks of Absence of.—If there is evidence before the jury that a belt shifter or like mechanical device could have been maintained in use at the place in question, and also evidence to the contrary, and the jury is instructed that if they find from a fair preponderance of the evidence that proper belt shifters could have been provided and maintained in use without substantial interference with the use and operation of the machinery, and that they were not provided and maintained, they should find for the plaintiff, unless he contributed to his own injury by negligence or recklessness, a judgment in favor of the plaintiff should not be reversed on the ground that he assumed the risk resulting from the absence of such shifters. (p. 1010.)

DAMAGES—Verdict, When not Excessive.—In an action to recover for personal injuries, a verdict in favor of the plaintiff for six thousand dollars is not excessive when it appears that the injury was to the bone of his ankle joint, that he was long in the hospital under treatment, that pieces of bone were extracted, that a discharging sore continued up to the time of the trial, and that the joint remained stiff, and the evidence indicates that permanent anchylosis has resulted. (pp. 1010, 1011.)

James H. Ashton and W. H. Hayden, for the appellant.

Govnor Teats, for the respondent.

154 HADLEY, J. This is an action to recover damages for personal injuries. Plaintiff was, at the time he received his injuries, in the employ of the defendant, and his duties were those of attending to a cut-off saw. The saw was operated by means of a belt extending upward from a pulley attached to the saw, the belt being also connected with a pulley above. The latter pulley was run by means of another, to which was attached a power belt connecting with the main shaft, which was propelled by steam power in the mill. The belt at the saw had become unlaced, and was liable to be caught so as to cause injury to the plaintiff. No belt shifters were provided, and this belt could not be repaired without stopping the entire mill or removing the power belt above. Plaintiff notified the head sawyer of the situation, and the latter caused the mill to be stopped.

About this time the foreman appeared, and the plaintiff testified that the foreman then ordered him to go up and remove the power belt. The foreman says he told him to remove the saw belt. The plaintiff is corroborated by another witness, who says he heard the order, and that he and the foreman stood together and watched plaintiff while the latter was attempting to remove the power belt. Plaintiff ascended a ladder and stood upon a plank above for the purpose of reaching the power belt. He descended to get a stick to assist in the removal, and then returned to the position above. Meantime the mill was started by direction of the foreman, and plaintiff says it was running at about half its ordinary speed. He says he understood that it was thus started and run at the reduced rate of speed for the purpose of assisting him in the removal of the belt, as some motion was necessary in order to effect the removal. While attempting to remove it by the aid of the stick he was caught and injured. He alleges in his complaint that the defendant was negligent in not providing a proper belt shifter or other me-

chanical contrivance for the removal of the belt. The answer alleges that the plaintiff assumed the risk of the danger, and [155] that his injuries were due to his contributory negligence. A trial was had before a jury, and a verdict was returned for plaintiff. From a judgment entered upon that verdict, the defendant is prosecuting this appeal.

A large part of appellant's brief is devoted to a discussion of its contention that the court erred in not holding, as a matter of law, that respondent assumed the risk of the danger. Section 1 of chapter 37 of the Laws of 1903, page 40, provides as follows: "That any person, corporation or association operating a factory, mill or workshop where machinery is used shall provide and maintain in use proper belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys."

Respondent alleges negligence of appellant in not complying with the requirements of the statute. Appellant argues that, inasmuch as respondent had full knowledge of the situation, he waived the requirements of the statute and assumed the risk of the danger. Since appellant's brief was written, the case of Hall v. West & Slade Mill Co., 39 Wash. 447, 81 Pac. 915, was decided. In that case it was held that the provisions of the statute above cited cannot be waived by an employé. A similar holding with reference to another statute of like effect was made in Green v. Western American Co., 30 Wash. 87, 70 Pac. 310. It is unnecessary at this time to review the arguments of those cases, for the reason that we regard the question now raised by appellant as settled against its contention. Under the above decisions it was negligence per se for defendant to fail to maintain proper belt shifters, and respondent would not waive the statute and assume the risk of the danger consequent upon such neglect.

It is further contended that, notwithstanding the statute, if a belt shifter was not necessary or practicable, then respondent assumed the risk, and that it should have been left to the jury to say whether it was necessary or practicable to provide such a device at the place in question. The legislature [156] has left little room in the premises for the exercise of discretion of mill operators, or of judgment on the part of juries. The statute was manifestly intended for the protection of life and to prevent the mangling of human bodies. To that end the legislature sought to make the protection as complete as such devices can make it. It did not say that

belt shifters shall be maintained where necessary, and leave mill operators and juries to say when the necessity exists. The term "proper belt shifters," as used in the statutory connection, does not merely mean belt shifters in proper or necessary places, but rather sufficient "belt shifters or other mechanical contrivances" to effect the "throwing on or off belts on pulleys." There is no classification of pulleys or places as to the matter of necessity or practicability; and it was the manifest theory of the lawmakers that, when belts have been placed upon any pulleys for the purpose of operating machinery, the necessity of removing and replacing them will at some time arise; and that, in order to guard against danger from an attempt to shift them while in operation, some effective contrivance must be maintained for that purpose.

It certainly must be conceded that the contrivances must be maintained at all places where belts are shifted while in operation, in order to exempt the mill owner from the charge of negligence. The shifting of some belts while the machinery moves may seldom occur, but it is upon those rare occasions that the protection is needed. We are not now prepared to say that occasion may never arise when a question of this character may be proper for a jury, although it seems to us that, under this statute, such occasions must be very rare. To open the way for controversies as to whether the protection designated by the statute is or is not necessary or practicable in given places would lead to much litigation which might result in the nullification of the very purpose of the statute. Such statutes are mandatory, and it is not for the mill owners or juries to say whether the requirements are wise or necessary. Passing upon a similar principle, the [157] supreme court of Montana, in State v. Anaconda Copper Min. Co., 23 Mont. 498, 59 Pac. 854, said: "The contention that the court erred in excluding evidence offered to show that the devices or cages required by the amended law would be dangerous, and apt to result in accidents, must fall also. The text of the law discloses a measure designed to guard against the dangers incident to lowering and elevating men in deep mining shafts. Whether the cased-in cage and its appliances is the best or wisest method was a question for the legislature to decide."

But what may have been appellant's absolute right in this regard in the case before us we need not determine, since we think the question was actually submitted to and passed upon

by the jury to such an extent that, even under appellant's contention, its rights in the premises were not prejudiced. There was before the jury evidence of millwrights that belt-shifting devices could have been effectively maintained and operated at the place in question, and there was also the evidence of others that they could not. The issue was therefore squarely made in the evidence, although it was not raised by appellant's answer to the complaint, and was not within the pleadings. The court instructed the jury as follows: "While the law commands the performance of the duty I have named, it does not require or compel the performance of an impossible or impracticable and useless thing. If you find from a fair preponderance of the evidence that proper belt shifters or other mechanical contrivances could have been provided and maintained without a substantial interference with the use and operation of the machinery, and that no such proper belt shifters were provided and maintained, and that the failure to so provide and maintain them was the proximate cause of the injury complained of, then you should find for the plaintiff, unless you further find from a fair preponderance of the evidence that plaintiff in any wise contributed to his own injury by carelessness, negligence or recklessness."

Under the evidence admitted, and under the above instruction, the appellant undoubtedly had the benefit of a finding by the jury upon the subject. The jury must have found, under [158] the evidence and under that instruction that proper belt shifters could have been practicably provided and maintained.

We think the question of contributory negligence was, under the circumstances, properly submitted to the jury, and that it was submitted under proper instructions.

It is insisted that the verdict was excessive. It was in the sum of six thousand dollars. Respondent's injury was in the bones of the ankle joint. He was long in the hospital under treatment. Pieces of bone were extracted at the joint, and a discharging sore continued up to the time of the trial. At the ankle joint where the bone was removed a hole or depression exists, about one and one-half by two inches in dimension. He cannot move the foot. The joint is stiff, and the evidence shows that permanent anchylosis has resulted. Appellant cites Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377, as authority for reducing this verdict. The verdict in that case was also for six thousand

dollars, and was, by direction of this court, reduced to four thousand dollars. The injury there consisted of a fracture of the ulna of the forearm, and a dislocation of the head of the radius. The turning motion of the forearm was to some extent limited, and at the elbow the arm could not be bent to the full extent. The evidence showed that Bailey was still able to cut wood, and that his earning capacity was not greatly lessened. Moreover, the trial court in that case, in its order denying a motion for new trial, expressly stated that the amount of the verdict should not have been in excess of four thousand dollars, but declined to require a remittance from the amount, in the belief that it lacked the power to do so. This court held that it had such power, and directed that it should require Bailey to remit two thousand dollars or submit to a new trial. The record discloses no such finding of the trial court in this case. The denial of the motion for new trial, which expressly raised the point, shows that, in the opinion of that court who saw and observed respondent's injury, the verdict was not excessive. We do not think the evidence is such that we would [159] be justified in interfering with the trial court's ruling in that regard.

The judgment is affirmed.

Mount, C. J., and Dunbar, J., concur.

Fullerton, J., concurs in the result.

Rudkin, Root, and Crow, JJ., concur, in view of the decision in Hall v. West & Slade Mill Company, 39 Wash. 447, 81 Pac. 915.

In the Case of Hoveland v. Hall Brothers M. R. & S. Co., 41 Wash. 164, 82 Pac. 1090, substantially the same questions were presented and determined as in the principal case, and the appellate court reaffirmed that the defense of the assumption of risks from an unguarded shaft coupling cannot be raised where the defendant has violated the factory act requiring the coupling to be guarded. The question of whether the defense could be made that no mechanical device was practicable in the case before the court was again presented, but as in the principal case, the appellate court was of the opinion that the instructions of the trial court were sufficient to have presented this question to the jury, which, having found in favor of the plaintiff, gave the defendant no ground for complaint.

In Erickson v. McNeeley, 41 Wash. 509, 84 Pac. 3, the question presented was, whether under the provisions of the factory act an employé assumed the risk of injury from an unguarded saw if it

could have been properly guarded, and it was held that the employer was guilty of negligence as a matter of law in failing to guard the saw; that it was for the jury to determine whether the saw could have been properly guarded; and further, that the owner of the mill in which the saw was operated could not avoid responsibility for injury to an employé by showing that the mill had been leased to an independent contractor, who was in full charge and control at the time of the accident, it further appearing that the lessor was one of the stockholders who had previously been general manager of the mill, and that no announcement of the lease was made except privately to one or two employés, and that the change was not indicated in any way, and that the employés generally did not know thereof.

Practically the same questions except the last were considered, and the same conclusion reached in Rector v. Bryant Lumber Co., 41 Wash. 556, 84 Pac. 67.

Where an Employer Violates an Express Statutory Duty imposed for the better protection of employés, the doctrine of assumption of risks has, according to the better rule, no application: See the monographic note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 891.

STATE v. STRODEMIER.

[41 Wash. 159, 83 Pac. 22.]

JURY TRIAL—Separation of Jury and Drinking of Whisky.—If, on the trial of a criminal prosecution, the jury is ordered to be kept together in charge of the bailiffs, and one of the jurors in company with a bailiff separates from the others and goes to a public saloon without permission from the court or the consent of the accused, and takes a drink of whisky, and immediately, in charge of such bailiff, returns to the other jurors, this is such misconduct on the part of the juror as entitles the accused, if convicted, to a new trial, though no conversation took place in addition to that necessary to ordering the drinks. (p. 1014.)

JURY TRIAL.—Affidavits to Show that the Misconduct of a Juror did not Result in Prejudice are not admissible on an application for a new trial. (p. 1014.)

W. J. Canton and W. E. Southard, for the appellant.

W. A. Reneau and Sam B. Hill, for the respondent.

160 MOUNT, C. J. Appellant was convicted of the crime of cattle stealing. He alleges three errors of the trial court. One of these is decided adversely to his contention in State v. Strodemier, 40 Wash. 608, 82 Pac. 915. Another cannot arise upon a new trial. It is therefore necessary for us to

consider but one of the alleged errors. At the beginning of the trial of the case, the jury was ordered kept together in charge of sworn bailiffs. While the jurors were not sitting in the jury box, they were kept at a hotel at the county seat. On the morning of January 5, 1905, before the court had convened for the day, and before the jury had breakfested, one of the jurors, in company with one of the bailiffs, went to a public drinking saloon out of the hotel, without permission of the court or the consent of appellant, and there took a drink of whisky, and immediately returned in charge of said bailiff to the other jurors at the hotel. One or two other persons beside the bar-tender were in the saloon while the juror and the bailiff were there, but no conversation took place between said juror and other persons, except such conversation [161] as was necessary to order drinks. Appellant maintains that this was such misconduct of the jury as to entitle him to a new trial. The question was presented to the trial court upon motion for a new trial, which was denied.

The court should have sustained the motion upon this ground. If the rule is established that a juror, in company with a bailiff, may separate from the body of the jury and go to a public drinking saloon, and there indulge in drinking intoxicating liquors, without the knowledge of the trial judge or the consent of the defendant, dire results may follow. If one juror may be permitted to do such acts, the whole jury may do so, and jurors disposed to such habits may readily bring jury trials into disrespect and contempt. Public policy forbids that such acts be tolerated in the trial of causes. The fact that the juror took a drink of intoxicating liquor during the trial is not so reprehensible of itself as the fact that he went to a public drinking saloon and, at such public place in the presence of the bar-tender and one or two others, drank liquor, and was permitted to go there by an officer whose sworn duty required that he should not give the juror drink except by order of the court.

It is the policy of the law, in keeping jurors together and away from the public, that nothing outside of the evidence shall be permitted to influence their verdict. When they are taken, either singly or in a body, to a public drinking saloon, where people who are interested may be expected to, and frequently do, congregate to discuss the case on trial, an opportunity is afforded for undue influence upon the jury, and the spirit, if not the letter, of the law is violated. Cases,

no doubt, frequently arise where, from necessity, a juror is permitted to withdraw from the body of the jury for a short period of time, and without the express order of the court or the consent of the defendant on trial. Such acts, of course, arise from necessity, and would not be held to be misconduct. But such is not the case here. The only excuse offered is [162] that the juror was suffering from a cold and pain in the stomach. If these facts were true, no emergency is shown, and no excuse is offered for not applying to the court for an order for some remedy, which could readily have been granted without exposing the juror to the public in the unseemly manner which he took upon himself. Neither he nor the bailiff was justified in this conduct.

In order to avoid the misconduct of this juror, the state filed affidavits of several of the jurors to the effect that the juror was the last to consent to a verdict of guilty; and it is contended for that reason that the misconduct of the juror was without prejudice. But the rule seems to be that, where misconduct is admitted, jurors cannot be heard to deny its prejudicial influence: People v. Chin Non, 146 Cal. 561, 80 Pac. 681; People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; People v. Azoff, 105 Cal. 632, 39 Pac. 59.

We think that, under the circumstances of this case, prejudice must be presumed. The judgment is therefore reversed, and the cause remanded for a new trial.

Dunbar, Hadley, Crow, and Root, JJ., concur.

RUDKIN, J., Dissenting. There are but two conceivable reasons why the verdict should be set aside in this case: First, because one of the jurors was separated from his fellow-jurors, for a few minutes, in company with a sworn officer of the court having him in charge; or, second, because the same juror entered a public saloon and took a drink of whisky during the progress of the trial. We cannot believe that the majority intends to lay down the rule that a verdict must be set aside every time a juror enters a public saloon or takes a drink of whisky during the progress of a trial. Those who are familiar with the habits of twelve men picked up from the ordinary walks of life know full well the results that would follow from the adoption of any such rule.

Nor did the withdrawal of the juror from his associates under the facts disclosed in the record constitute a separation [163] of the jury in legal contemplation. "The presump-

tion will not be indulged in that a separated juror was tampered with in the immediate presence of the officer having him in charge": 12 Ency. of Pl. & Pr. 572. Even where there is an improper and unauthorized separation of the jury, according to the great weight of authority, the only effect of the separation is to throw upon the state the burden of rebutting the inference that injury or prejudice may have resulted to the accused by reason of the separation: 12 Ency. of Pl. & Pr. 568-570. It is unnecessary for us to consider what the proper rule should be in this jurisdiction, under such circumstances, but we refer to the majority rule for the purpose of showing that, in a case like this, where there has been no separation in fact, and where it is affirmatively and conclusively shown that no prejudice resulted, a new trial should not be granted. While the conduct of the bailiff and juror is properly subject to censure and criticism, the parties to the action were in no manner responsible for their shortcomings.

We think proper punishment meted out to the juror and the officer for their contumacious conduct in disobeying the orders of the court would fully satisfy the demands of public justice and that the new trial should be denied.

Fullerton, J., concurs with Rudkin, J.

The Effect of the Separation of Jurors is the subject of a monographic note to Gamble v. State, 103 Am. St. Rep. 155-171. At page 168 of this note will be found authorities to the effect that where, in the course of a criminal trial, a juror enters a saloon, or stops at the bar while passing through, to get a drink or cigar, he being in view and hearing of an officer and not communicating with anyone, this does amount to such misconduct as calls for a new trial.

HALL v. HALL.

[41 Wash. 186, 83 Pac. 108.]

HOMESTEAD Under Federal Laws—Interest of Divorced Wife. If, while a husband and wife reside on public lands and he has a preferential right to make a homestead entry thereon when they shall be surveyed, she is granted a divorce from him, she does not have any right in such lands entitling her to an interest therein on their being patented to him on his compliance with the homestead laws. (p. 1018.)

Binkley, Taylor & McLaren, Voorhees & Voorhees, and Charles Francis Voorhees, for the appellants.

J. C. Marshall and S. & J. W. Douglas, for the respondent.

187 RUDKIN, J. Prior to the year 1898 the lands in controversy in this case were unsurveyed public lands of the United States. In the month of June of that year the surveyor's plat was filed in the district land office, and on the thirtieth day of August, 1898, the lands were thrown open for settlement. On the latter date John F. Hall, now deceased, entered said lands under the homestead laws of the United States, and made final proof on the eighth day of August, 1899, after completing his five years' residence thereon, as required by said homestead laws. Patent issued on the ninth day of February, 1900. At all times between the twenty-fourth day of March, 1889, and the fourth day of March, 1896, said John F. Hall and the plaintiff Anna M. Hall were husband and wife. On the latter date the plaintiff was granted a divorce from said John F. Hall in the superior court of Spokane county, but no disposition was made of the property rights of the parties in the divorce proceeding. On the thirtieth day of August, 1899, the said John F. Hall and the defendant, Estella B. Hall, intermarried, and continued to live together as husband and wife until the death of the former, on the fifth day of February, 1903. On the tenth day of January, 1903, said John F. Hall conveyed all his interest in said property by deed to the defendant Estella B. Hall. In view of the conclusion we have reached on the merits, it becomes unnecessary to refer to the claims of the other defendants.

188 The plaintiff brought this action, and asked that she be declared the owner of an undivided one-half interest in the property so acquired. The theory of the plaintiff's case

was that said property was the community property of herself and her former husband, John F. Hall, and that by the decree of divorce they became tenants in common thereof. The plaintiff had judgment below, according to the prayer of her complaint, and the defendants appeal.

The only interest the decedent had in the property in controversy at the time of the divorce was the right of occupancy, coupled with a preference right to enter the land and acquire title thereto after the same was surveyed and thrown open for settlement. Before he could acquire such title the land must be surveyed and thrown open to settlement, he must continue his residence until that time, and thereafter comply with the requirements of the homestead laws. How far state laws regulating the property rights of husband and wife attach to land acquired from the United States before patent, or at least before final proof, gives rise to an important federal question which can only be authoritatively settled by the supreme court of the United States. In the recent case of McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. Rep. 78, 50 L. ed. 237, that court held that the patent which issues to the widow upon the death of the homestead entryman carries with it the full legal and equitable title, to the exclusion of the entryman's children; in other words, that the federal law controls. True, the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entryman, and that the entryman only acquires an undivided one-half interest on the death of the wife, under identical circumstances.

The manifest object of our community property system is to place husband and wife on an equal footing as to their [189] property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other. Furthermore, it is a well-known fact that our community system is utterly ignored in the administration of the federal land laws. The wife is not made a party to a contest against an entry, and the husband is permitted to relinquish without the wife joining him. In Ahern v. Ahern, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023, this court held that, where the wife of the entryman died after the homestead law had been fully complied with, but before final proof, her children were entitled to a one-half interest in the homestead claim, as community property. In

James v. James, 35 Wash. 655, 77 Pac. 1082, it was intimated that the community rights of the wife attached at even an earlier date. We are not called upon to retrace our steps at this time, but we are satisfied that we can advance no farther without coming in conflict with the paramount laws of the United States and the decisions of the federal supreme court. Under no proper construction of the laws of the United States and of this state can the respondent be held to have any interest in the property in controversy, under the facts disclosed in the record before us.

The judgment is therefore reversed, with directions to dismiss the action.

Mount, C. J., Hadley, Fullerton, Crow, Root, and Dunbar, JJ., concur.

The Question of the Interest of a Wife in lands which, during the coverture, were occupied by her husband, and which are subsequently patented to him by the United States, was further considered in Cunningham v. Krutz, 41 Wash. 190, 89 Pac. 109. In that case it appeared that a husband and wife occupied lands, and that he made a homestead entry, and within less than three years thereafter she died. He did not reside upon the land the required time to perfect the homestead, but commuted his homestead right after the death of his wife and made final payment, in pursuance of which, in due course, a patent was issued to him. The heirs of his wife claimed that under the laws of Washington she had acquired an interest in the property to which they succeeded. The supreme court of that state, however, after considering its own decisions and the various decisions of the federal courts upon the subject, concluded that the decisions of the latter were controlling, and announced that if one made a homestead entry and died before completing the residence period necessary under the homestead laws, leaving a widow who completed the period of such residence, made proof, and procured a patent, the land became her separate property, but in the case before the court, the wife having died and the husband having afterward commuted the homestead rights, made final proof and payment, and procured a patent, he thereby relinquished the homestead entry and availed himself of the benefits of the law granting pre-emption rights, that the title conveyed to him was based upon a consideration passing from him to the United States, and that he hence took title as his sole and separate property in which the heirs of his wife could, as such, have no interest.

If a Homestead Claimant to Public Land dies before patent therefor issues, or before a right to demand a patent has accrued, the land does not become a part of his estate. Upon his death all his rights under the homestead cease, and his heirs become entitled to a patent, not as successors to his equitable interest, but because the law gives

them a preference as homesteaders, and allows them the benefit of the residence of their ancestor upon the land: Gjerstadengen v. Van Duzen, 7 N. Dak. 612, 66 Am. St. Rep. 679. See, further, Kelsay v. Eaton, 45 Or. 70, 106 Am. St. Rep. 662; Ahern v. Ahern, 31 Wash. 334, 96 Am. St. Rep. 912.

STATE v. WASHINGTON IRRIGATION COMPANY.

[41 Wash. 283, 83 Pac. 308.]

MANDAMUS Will not Issue Against an Irrigation Company to Compel It to Furnish Water to the applicant as provided in a private contract entered into between him and it, because he has an adequate remedy under his contract. (p. 1022.)

W. H. Bogle and H. J. Snively, for the appellant.

Ira P. Englehart and E. F. Blaine, for the respondent.

283 HADLEY, J. This is an action in mandamus. The affidavit in support of the application for the writ states that the Washington Irrigation Company is a corporation, and 284 is the owner of an irrigating canal, commonly known as "Sunnyside" canal; that it is a common carrier of water for irrigation purposes, and is charged with the duty of furnishing water for irrigation of lands lying under said canal, upon reasonable compensation being tendered and made therefor; that the relator is the owner of certain described lands lying under said canal, amounting to three hundred and twenty acres, more or less, which are arid and dependent upon irrigation to produce agricultural crops; that the relator holds a water deed and water right contract from and with said corporation for water to irrigate her said lands, which contract was executed in November, 1902; that said contract provides that she shall pay annually in advance to the irrigation company, on the first Monday in May of each year from the date of the contract, the sum of one dollar per acre, and in case of default in such payment for the period of thirty days after the same shall become due, the irrigation company shall have the right and option to refuse to furnish water until such rental and arrearages shall be paid in full; that the contract further provides that the irrigation company shall deliver to her a lateral or flume, to be connected with its main or branch canal nearest her land

along the line of its right of way, at such point as to the company may seem most practicable, which lateral flume shall be located by the company and shall be constructed and maintained by the relator. The contract further requires that the company shall construct and maintain the necessary works of delivery, except the lateral flume, and shall place and maintain, at the point of delivery, suitable measuring boxes or gates.

The affidavit further states that one branch of the canal is about one-half mile from the north line of the relator's lands, and another branch runs near the west line thereof; that, desiring to cultivate her lands during the year 1904, she notified the company, about March 23d of that year, to designate the point on the canal from which the lateral to [285] her land should be constructed, and to locate the lateral; that she thereupon tendered to the company the sum of three hundred and twenty dollars, in payment of the annual rental for water for the year 1904, and demanded the delivery of water to her lands during the season of said year; that thereupon the company did indicate that she should receive water through a certain small lateral, running across the lands of one Eaton, but refused, and still refuses, to furnish her with any water whatever except on condition that she shall pay to the company the sum of three hundred and twenty dollars, claimed by it for water rental for the year 1903, as well as the further sum of three hundred and twenty dollars as rental for the year 1904; that no water was delivered during the year 1903, and that the company never, at any time prior to March 28, 1904, designated the point from which a lateral to be constructed by the relator should receive water from the canal, and did not locate such lateral; that it has never at any time constructed the necessary works of delivery, and has not provided measuring boxes or gates.

On the above facts the relator asked the issuance of the writ of mandate, to compel the irrigation company to deliver water to her lands for the year 1904, and also to compel it to provide suitable measuring boxes or gates at the point of delivery of the water upon her lands. The company answered the affidavit, making issues thereon, and the cause came on for trial before a jury. A witness was sworn to testify, when the company objected to the introduction of any testimony, and moved that the cause be withdrawn from the jury and that it be dismissed, on the ground that the affidavit did not

state facts sufficient to authorize the issuance of the writ of mandate. The objection was sustained, the motion granted, and judgment was entered dismissing the action. From the judgment the relator has appealed.

Appellant assigns as error that the court refused the admission of its offered evidence, and entered judgment of dismissal. She insists that mandamus is the proper remedy in the premises. It will be observed from the foregoing statement [286] that the parties entered into a contract by the terms of which respondent is to furnish water to appellant, under certain specified conditions. The contract is a private one between the parties. Appellant argues in her brief, however, that respondent is a public service corporation, a common carrier of water, and that it is under the duty to furnish water to her lands, upon demand, and upon payment or tender of a reasonable compensation therefor. We need not examine the question as to whether respondent is a common carrier, with such public duties imposed upon it by law as may be enforced by mandate when there is no other adequate remedy. Appellant's application shows that she is not dependent upon the remedy which is provided for the enforcement of a mere public duty. It shows that she holds a private contract whereby respondent has obligated itself to furnish water. She can resort to the ordinary remedies upon that contract as in the case of any private contract.

In support of her contention that mandamus is the proper remedy here, she cites Price v. Riverside Land etc. Co., 56 Cal. 431, and McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264. An examination of those cases, however, discloses that each was based squarely upon the theory that there was a refusal to discharge a public duty. It does not appear that a private contract between the parties existed in either case. Our statute provides that the writ of mandate will issue "where there is not a plain, speedy, and adequate remedy in the ordinary course of law": Ballinger's Code, sec. 5756. This is the general rule, and the courts hold that mandamus is a remedy to compel the performance of a duty required by law where the party seeking relief has no other adequate remedy, and where the duty sought to be enforced is clear and indisputable: Board of Commrs. v. Aspinwall, 24 How. 376, 16 L. ed. 735; Bayard v. United States, 127 U. S. 246, 8 Sup. Ct. Rep. 1223, 32 L. ed. 116; United States v. Windom, 137 U. S. 636, 11 Sup. Ct. Rep. 197, 34 L. ed. 811; Terri-

tory v. Crum, 13 Okla. 9, 73 Pac. 297; [287] State v. Paterson etc. R. Co., 43 N. J. L. 505. In Florida etc. R. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30, 13 South. 103, 20 L. R. A. 419, it was said that mandamus will not lie to enforce the performance of private contracts: See, also, State v. Trustees of Salem Church, 114 Ind. 389, 16 N. E. 808; Parrott v. Bridgeport, 44 Conn. 180, 26 Am. Rep. 439; Merrill on Mandamus, sec. 16; High on Extraordinary Legal Remedies, 3d ed., sec. 25.

We think appellant has an adequate remedy upon her contract, and that mandamus does not lie. The judgment is affirmed.

Mount, C. J., Fullerton, Root, Crow, and Dunbar, JJ., concur.

Rudkin, J., having heard the case in the court below, took no part.

The Writ of Mandamus is not usually regarded as an appropriate remedy for the enforcement of private contracts: Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114; Florida etc. Ry. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30; Miller v. State Board of Agriculture, 46 W. Va. 192, 76 Am. St. Rep. 811; New Orleans Auxiliary Sanitary Assn. in Liquidation, 105 La. 172, 83 Am. St. Rep. 230. In Combs v. Agricultural Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, mandamus is held an appropriate remedy to compel the delivery of water for irrigation purposes.

WALDRON v. KINETH.

[41 Wash. 459, 84 Pac. 16.]

HOMESTEADS.—An Execution Sale of a Homestead in defiance of a claim for exemption and in the absence of the appraisement required by law is void. (p. 1024.)

HOMESTEAD—Execution Sale, Refusal to Confirm.—If an execution sale has been made of real property, the question of whether it was a homestead and sold without appraisement or other compliance with the law respecting the forced sale of homesteads may be presented in opposition to the confirmation of the sale, and confirmation thereof may be refused. (p. 1027.)

John F. Reed, for the appellant.

Lester Still, for the respondent.

[460] CROW, J. On June 18, 1900, appellant recovered in the superior court of Island county a personal judgment

against respondent for three hundred and sixty-three dollars and eighty cents and costs, and on October 21, 1904, caused an execution to be issued thereon, which the sheriff of said county levied upon three hundred and twenty acres of land belonging to respondent. Thereafter, on December 3, 1904, said sheriff, having first advertised said land, sold the same under said execution to appellant for five hundred and sixty-three dollars and sixty-three cents, the full amount of his judgment, including interest, costs and accrued costs. After the levy of said execution, but before sale, respondent being the head of a family consisting of himself, his wife, and one minor child, filed with the auditor of Island county a declaration of homestead on all of said land, in accordance with the requirements of chapter 64 of the Laws of 1895, pages 109-114. He had previously resided on the land with his family, but prior to the date of the execution had temporarily left the same, and was residing with his mother on an adjoining tract, with the intention, however, of returning to his homestead, which he did prior to said execution sale.

On the date of the sale, respondent, appearing in person and by attorney, claimed said homestead as exempt, and protested against said sale, with which the sheriff proceeded, and at which appellant was the only bidder. Appellant made no attempt to secure a sale of such homestead in the manner provided by said chapter 64 of the Laws of 1895. The sheriff's return of sale was filed December 19, 1904, and within ten days thereafter respondent filed written objections to confirmation on the grounds (1) that said land was his homestead; (2) that no appraisement thereof had been made as [461] required by law; and (3) that the sum bid and for which the land was sold was less than his homestead exemption. Appellant having moved for confirmation, his motion and respondent's objections were heard together on February 13, 1905, at which time the court admitted and considered evidence for the purpose of determining whether said land was in fact respondent's homestead and exempt as such, and thereupon finding the same to be his homestead, entered an order setting aside said sale. From said order, this appeal has been taken.

Several assignments of error have been presented which involve but one question—Was appellant entitled to an order confirming said sale? Respondent's objections were based

upon the contention that, as said land was his homestead, and as he had filed his declaration and claimed his exemption prior to sale, and as there is no claim or pretense that appellant in seeking to enforce his execution applied to the court for the appointment of appraisers, or that appraisers were appointed, or that any appraisement was made, or that appellant in any manner proceeded in accordance with said chapter 64 of the Laws of 1895, therefore such pretended sale was without authority of law and void. We think this contention should be sustained.

Appellant, however, insists that the question as to whether said land was in fact respondent's homestead and exempt as such cannot be tried or determined upon the hearing of a motion for confirmation, but that, upon such hearing, the only question for consideration under Laws of 1899, page 87, section 6, is the regularity or irregularity of the sale proceedings; citing Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054, and Harding v. Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222. While certain language used in said cases, when considered apart from the peculiar facts and issues there involved, might seem to sustain appellant's theory of the practice, yet we think his contention is utterly inconsistent with principles announced [462] by us in Field v. Greiner, 11 Wash. 8, 39 Pac. 259, and Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

Because of an apparent conflict between the two cases last mentioned and those cited by appellant, we have taken occasion to examine the original record in Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054, and find that the original default judgment therein was entered upon proof of personal service made without the state of Washington and also a further service by publication; that real estate belonging to the defendants had been attached; that said real estate was sold on April 18, 1896, on execution issued on said judgment, and was returned and entered for confirmation on April 20, 1896; that on May 15, 1897, long after the time for filing objections had expired, the defendants, who had not theretofore appeared, but then claimed to appear specially, filed written objections to the confirmation of said sale; that said objections were based entirely upon the contention that the judgment had been entered without jurisdiction, and was void for the want of any lawful service of summons. No attempt was then made in said objections to claim any exemption or homestead; the fact being that, before making

said objections, the defendants had sold and conveyed the real estate to a third party, who also filed written objections to said execution sale. Afterward, on June 1, 1897, amended objections were filed by the defendants in which a casual reference was made to the claim that said real estate had been their homestead, but even in such amended objections their only contention was that the judgment was void. The entire record discloses that the only issue considered was whether said judgment, which was regular on its face, was in fact void. After numerous hearings and continuances, the trial court finally entered an order which expressly recited that the defendants' objections to confirmation were sustained, for the reason that said judgment was null and void, and that the law did not require the court to do a needless or useless thing. It will thus be seen that [463] no determination was attempted to be made as to whether or not the land was in fact a homestead.

Upon appeal this court reversed the order of the trial court for the reasons: 1. That the objections to confirmation were filed too late; 2. That the proceedings instituted by the defendants simply amounted to an unauthorized collateral attack upon a judgment which, upon its face, appeared to be in all respects regular and valid. In the opinion this court said: "It will thus be seen that the only question which the court has a right to investigate is a question of irregularity in the proceedings concerning the sale." There was no showing of any such irregularity, nor any showing that the trial court even considered said question, which would properly come before it on a motion to confirm, or on objection to confirmation. In fact the record does show that on said hearing, instead of investigating the question of any irregularity in the proceedings concerning the sale, the trial court undertook to pass upon the validity of a judgment which was regular upon its face and disclosed proper service of process, and assumed to declare such judgment to be null and void.

In the later case of Harding v. Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222, the above language which we have quoted from Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054, was quoted with approval by Reavis, C. J. Immediately after making such quotation, the learned chief justice said: "The rights concerning the homestead could not have been heard or determined upon the motion to confirm the sale." We do not think that this sweeping statement is a corollary of any prin-

ciple announced in Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054, and we cannot adopt the same to its full extent. The record in Harding v. Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222, fails to show that, on the hearing of the motion for confirmation, the trial court had undertaken to try, or did try, or decide, the question of fact as to whether the land involved was a homestead. It does appear that an order of confirmation had been made, and in that respect the conditions were different from those in this case, in which the question of the existence of the homestead was tried and the [464] objections to confirmation were sustained for the reason that the proceedings concerning the sale were irregular as proceedings for the sale of a homestead on execution under the homestead act of 1895: Laws 1895, pp. 109-114.

In Field v. Greiner, 11 Wash. 8, 39 Pac. 259, on appeal from an order sustaining objections and refusing to confirm a sale of the judgment debtor's homestead, this court, speaking through Hoyt, C. J., said: "When the execution so issued was levied upon the property, it was within the power of the respondents to prevent a sale thereof by selecting it as a homestead, and it is not questioned but that the necessary steps for the purpose had been or were taken. It follows that after such selection the property could not be sold except in such a manner as to protect the homestead rights of the respondents. This was the conclusion to which the superior court arrived, and the order appealed from must be affirmed."

Again, in Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046, Fullerton, C. J., said: "It is also contended that the sale was valid notwithstanding the respondents may have had a homestead therein. The argument is that the homestead was of greater value than one thousand dollars, and could be lawfully sold for the excess, and that the decree, for that reason, instead of vacating the sale, should have directed that the value of the homestead be paid over to the respondents out of the purchase price of the property. Cases are cited from other jurisdictions where this contention is maintained, but, without stopping to review them specially, we think they are inapplicable under a statute like ours. Under our statute a sale of a homestead is not voidable merely, but absolutely void, when had under a general execution. It can be sold at no time except for its excess of value, and this only after certain requirements provided by the statute are complied with. It seems unnecessary to argue that, when an involun-

tary sale of real property is required to be made in a particular manner, no other manner of sale will pass title."

There can be no question but that the sale in this case was irregular, there being an utter failure to comply with any of the requirements of the homestead act of 1895. Under the [465] principles so well announced in Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046, said sale, being that of a homestead, was absolutely void, for a homestead cannot be sold on a general execution in any manner other than as provided in said homestead act of 1895. As the sale herein was void, it could convey no title to appellant, and it would be an idle proceeding for us to now make an order directing the superior court to confirm the same. The only possible result of such an order would be to promote unnecessary and vexatious litigation by compelling respondent to seek an adjudication of his rights in some future action to be instituted by him for the purpose of removing a cloud from his title. The trial court having found said land to be respondent's homestead, committed no error in refusing to confirm the sale.

The judgment is affirmed.

Mount, C. J., Root, Hadley, Rudkin and Dunbar, JJ., concur.

If Lands of Less Value than the Statutory Limit are rightfully claimed as a homestead, a sale thereof under execution is void, unless made to obtain the purchase money therefor, or for taxes or other matters expressly enumerated by statutory or constitutional provisions: Wagener v. Parrott, 51 S. C. 489, 64 Am. St. Rep. 695.

FARNANDIS v. GREAT NORTHERN RAILWAY CO.

[41 Wash. 486, 84 Pac. 18.]

LATERAL SUPPORT, Right to.—Every owner of real estate is entitled to have the soil preserved and supported in its natural condition, and the privileges of adjoining owners are so far limited that they may not so excavate or otherwise change the position of their land as to leave that of their neighbor less firmly supported. (p. 1030.)

LATERAL SUPPORT—Impairment Amounting to a Direct Injury.—When the soil is removed from its natural position by one owner and the soil of the adjacent owner is thereby permitted to fall, the result is not a consequential damage, but a direct injury. (p. 1031.)

LAND OWNER, Damage Resulting to from the Construction of a Tunnel on Adjacent Land.—If a railroad company constructs a tunnel one hundred and twenty feet distant from a parcel of land, to which injury results from the removal of lateral support or the sinking of the earth by blasting, the company is answerable, no matter how high the degree of skill and care it employed in its work. (p. 1033.)

LATERAL SUPPORT, Impairment of, When Supports a Recovery for Injury to Buildings.—If by work in constructing a tunnel the lateral support of the lands of an adjacent proprietor is impaired, and there is a sinking and cracking of the earth causing injuries to his buildings not due to their downward and lateral pressure on the soil he is entitled to recover for damages to his buildings as well as damage to his land. (p. 1033.)

JURY TRIAL—Instruction, When not Objectionable as Permitting an Award of Damages Personal to the Plaintiff.—An instruction that the jury, in determining what damages should be assessed to plaintiff by reason of injuries to his land, have the right to consider the use to which the land was put by plaintiff, and what damages he will sustain during the continuance of his leasehold interest in the property, is not objectionable as permitting him to recover damages personal to himself. (p. 1034.)

LATERAL SUPPORT, Impairment of by Tapping Subterranean Waters in a Public Street.—In an action to recover for damages to plaintiff's real property by impairing its lateral support, it is no defense that its subsidence was due to the tapping of subterranean waters in a public street. (p. 1036.)

DAMAGES.—A landlord whose buildings are injured by the impairment of their lateral support due to the action of a third person and without fault or negligence of the landlord is not liable to his tenants for the damages ensuing therefrom to them. (p. 1037.)

JURY TRIAL—Incorrect Statement of Law by Counsel in Argument.—If counsel have the right to argue the law to the jury, they must state it correctly, and if they make an incorrect statement, it is the duty of the court, on request, to correct them, and, failing to do so, the adverse party, if defeated, is entitled to a new trial. (p. 1037.)

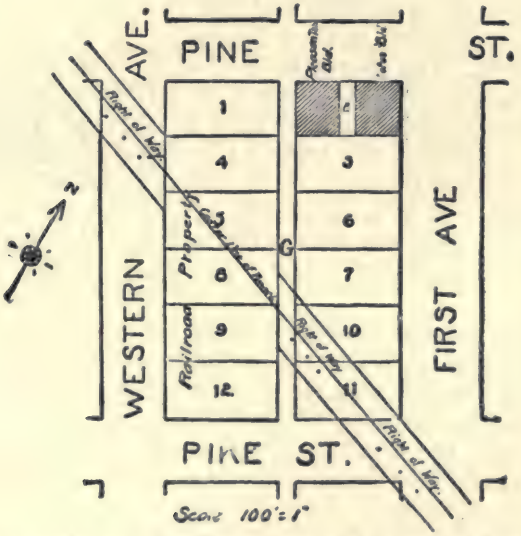
L. C. Gilman, for the appellants.

McCafferty & Bell, A. Jurich and Allen, Allen & Stratton, for the respondents.

[489] MOUNT, C. J. The respondents are the owners of a ground lease of lot 2 in block 6 of Denny's fourth addition to Seattle. They have erected and own two brick buildings thereon, which buildings are leased and used for lodging and hotel purposes. One of these buildings is known as the "Lotus" building, and the other as the "Pleasanton" building. The respondents Farnandis and wife and Hamm own the whole of the Pleasanton building and an undivided one-half of the [490] Lotus building. The respondents Morris and wife own an undivided half of the Lotus building. In the years 1903 and 1904 the appellant railway companies constructed a tunnel underneath said city of Seattle, for use for railway

purposes. This tunnel is about one mile in length and of varying depth from the surface. It was constructed in part under property belonging to the said railway companies, in part under private property through which an easement had been acquired, and in part under streets and alleys of the city, a franchise having been granted by the city permitting the same to be done. The tunnel in its course passes within about one hundred and twenty feet of lot 2, whereon respondents' buildings are situated.

The following is a sketch showing the relation of respondents' property to the tunnel; also showing the position of the tunnel in this vicinity constructed under a public street, the portion under the property of the railway companies, and the portion under property through which said companies have an easement.



491 The surface of the ground on which respondents' buildings stand is some higher than the surface over the tunnel, the land between the building and the tunnel being a sidehill. Respondents' buildings had been constructed for about two years prior to the time the tunnel was constructed, and were in a solid and substantial condition until the time of the construction of the tunnel. When the tunnel was being constructed in the immediate vicinity of the buildings, it became necessary to use large charges of dynamite and giant powder

to blast out the rock and gravel deposits in the tunnel. These blasts caused the buildings to shake so that occupants would not remain therein. Large cracks also opened up in the earth between the tunnel and the buildings, and caused the buildings to crack. A settling of the earth caused a partial collapse of the buildings and much damage thereto.

Separate actions were instituted by respondents against appellants. Respondents Farnandis and wife and Hamm alleged in their complaint that the construction of the tunnel through and under the property adjacent to the said buildings caused the earth to sink, settle, and subside, and thus occasioned the settlement and partial collapse of the buildings. They allege damages in the sum of twenty thousand dollars. The respondents Morris and wife alleged in their complaint that, by reason of the manner of construction of the tunnel, the lot was caused to settle and sink and the buildings caused to partially collapse, to their damage in the sum of ten thousand dollars. The answer to each of these complaints was a general denial. By the consent of all the parties, the two causes were consolidated and tried together, to the court and a jury. A verdict was returned in favor of Farnandis and wife and Hamm for seven thousand one hundred and seventy-five dollars, and in favor of Morris and wife for three thousand six hundred and seventy-five dollars. The railway companies have appealed from a judgment entered upon the verdict.

The first question presented in the briefs is whether or not, under the pleadings and the evidence, the respondents were entitled to recover damages to their buildings, occasioned by [492] the excavation made by appellants in the land adjacent to that whereon the buildings were located. No negligence was claimed against the appellants, either in the pleadings or the evidence, respondents' position being that, if the excavation made by appellants in their own land or in the lands whereon they had a license to make excavations, were made in such a manner as to cause a subsidence of the soil of respondents' lands, whereby the buildings were caused to settle and crack and be injured, the appellants were liable, notwithstanding their work had been performed in the most careful and prudent manner. This contention was sustained by the trial court, and evidence was received and the jury were instructed upon that theory. Appellants cite numerous authorities to the point that the right to lateral support applies only to the

land itself, and not to buildings or other artificial structures thereon, and the weight of authority seems to be that where one person excavates on his own land in a careful and prudent manner, he is not liable for consequential damages accruing to his neighbor. But this rule is modified to this extent: "That an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away by its own weight and fall upon his land. But this right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward or lateral pressure. If it did, it would put it in the power of a lot owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter": Transportation Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

The rule is firmly established that "every owner of real estate is entitled to have the soil preserved and supported in its natural condition, and the privileges of adjoining owners are so limited that they may not so excavate or otherwise change the position of their [493] land as to leave that of their neighbor less firmly supported": 1 Am. & Eng. Ency. of Law, 2d ed., 229. See, also, Larson v. Metropolitan St. R. Co., 110 Mo. 234, 33 Am. St. Rep. 439, and note, 19 S. W. 416, 16 L. R. A. 330. "Nor is his liability in any wise dependent upon the degree of skill or care which he exercises": Monographic note to Larson v. Metropolitan St. R. Co., 33 Am. St. Rep. 450. See, also, Baltimore etc. R. Co. v. Reaney, 42 Md. 117; Schultz v. Bower, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. 631; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312. In order that these rules may stand together and not be inconsistent, it must follow that, when soil is removed from its natural position by one owner and the soil of an adjoining owner is thereby permitted to fall, such result is not a consequential damage, but is a direct injury.

In the case of Parke v. City of Seattle, 5 Wash. 1, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, this court held that the city was liable for damages caused by grading the street, whereby lands abutting on the street were deprived of their lateral support. In the case of Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, which was a case where an order was made restraining the city from

grading a street in front of Mrs. Brown's property until the damage which would be caused by such grade was first ascertained and paid, this court held an injunction was proper, and in the opinion said: "But the main question is, Admitting the fact of injury, would the respondent be entitled to compensation from the city? Previous to the adoption of the constitution she would have been without remedy, excepting for such injury as might have occurred to her land alone, arising from the withdrawal of support and its consequent actual falling in, or from the negligence of the city in doing the work. But the constitution of this state (article 1, section 16) provides that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into the court for the owner, and it is upon this prohibition that [494] the respondent bases her right to an injunction. The earlier constitutions of the several states in the Union contained, with but a few exceptions, a provision that private property should not be taken for public use without just compensation. After almost twenty years of discussion and decision in Illinois and other states, we put the words 'taken or damaged' into our constitution, and they must have their effect. It is now too late to argue this argument [i. e., the word 'damage' gave no additional or greater security to the appropriator for public use] against the recovery of such damages as are threatened to be caused by the action of the city of Seattle here in question. Every court in which the point has been raised has decided in favor of the private citizen; but, were it now presented to us for the first time in the history of the phrase, we should not be disposed to view it in any way different from that expressed in the cases we have cited. If private property is damaged for the public benefit, the public should make good the loss to the individual. Such always was the equity of the case, and the constitution makes the hitherto disregarded equity now the law of it."

In the case of Peters v. Lewis, 33 Wash. 617, 74 Pac. 815, which was an action for damages by reason of drainage from defendants' adjoining premises, this court held that a counterclaim alleging that plaintiff had removed the earth abutting upon the line of its lot, thereby leaving the lot without its natural lateral support, which caused defendants' land to slide and the foundations of their houses to become weakened, and destroyed the natural surface of the ground, was proper

matter for counterclaim. And in the case of Smith v. St. Paul etc. R. Co., 39 Wash. 355, 109 Am. St. Rep. 889, 81 Pac. 840, 70 L. R. A. 1018, which was carefully considered by this court after two separate arguments had been permitted and many authorities cited upon the constitutional questions involved here, we held that a property owner may recover damages resulting from the operation of railway trains which jar the earth and otherwise physically disturb the property. It was said in that case: "If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical [495] conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of the neighboring property entails thereupon." These cases are decided upon the theory that the act complained of is an interference with the rights of property, and that the damage is direct and not merely consequential.

The effect of our decisions, as above stated, is to hold that for a physical injury or direct invasion of property rights, damages are recoverable under the provisions of the constitution that "no private property shall be taken or damaged for a public or private use without just compensation having been first made." It follows, of course, that the liability does not depend upon the degree of care or skill used to prevent damage. The question whether the damage to the buildings situated one hundred and twenty feet away from the nearest point of appellants' tunnel was caused by the removal of the lateral support of the soil or by shaking the earth by blasts was a question for the jury. But in either event the liability of the appellants was the same whether the damage was caused with or without negligence. The sinking and cracking of the earth was evidently not due to any increased downward or lateral pressure upon the soil by the buildings, because the cracks and sinking appeared between the buildings and the tunnel and extended through the buildings. If the weight of the buildings did not in any wise contribute to the sinking or cracking of the earth, then the removal of the earth was the direct cause of the damage both to the land and to the buildings. To hold under such circumstances that appellants would be liable only for the damage to the land, and not to the buildings, would be to follow the

shadow of the old rule and to disregard the substance of it and the reason upon which it was based.

Appellants complain that the court erred in giving the following instruction: [496] "In determining what damages, if any, should be assessed to the plaintiffs by reason of the injuries to the land, if any were caused by the construction of the tunnel, you have a right to consider the use to which said land was put by the plaintiffs, and what damage, if any, the plaintiffs, S. C. Farnandis and R. H. Hamm in the one case, and Antone Morris and Perina Morris in the other case, will sustain thereby during their leasehold interest in the property."

It is claimed that this instruction permitted the jury to assess damages that were personal to the plaintiffs. We do not so construe the instruction, when read in connection with the other instructions. Just preceding this instruction the court instructed as to the elements of damage they might consider in reference to the buildings. There were two subjects of damage, viz., the land itself and the buildings, either or both of which may have been recovered for according to the injury. The use to which the land was adapted was proper to be considered in determining the value of the land and the damages sustained: Seattle etc. R. Co. v. Roeder, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac. 498. This instruction is not subject, we think, to the criticism made by the appellants.

There was some evidence to the effect that the cracks in the earth and the settling thereof might have been caused by the tapping of an underground stream or subterranean flow of water which caused the soil to be carried away. Appellants requested the court to give the following instruction: "I charge you that, if you find from the evidence in this case that the cause of the injuries to plaintiffs' property, if you find the same was injured, was the tapping of an underground stream or stratum by the boring of the tunnel into the earth, and that such underground stream or stratum so tapped ran out, causing a subsidence of the soil on which plaintiffs' buildings stand, then the defendants would be under no liability for the damages so caused, and plaintiffs would have no right to recover therefor, and if you do so find, your verdict must be for the defendants." The court gave this instruction, but modified it by adding the following: [497] "However, for this instruction to apply you must believe

that the percolating or subterranean waters withdrawn were upon the railway company's own property. It would not apply if such water was withdrawn from underneath or below or in a public street or in property which was not the property of said railway company"; thus, in effect, telling the jury that, while the appellants might have caused damage to the property without liability therefor, by tapping the subterranean flow of water on their own land, yet the easement in a public street did not authorize such damage without compensation. This modification was made by the court upon the theory that the city could grant no greater right than it possessed; and since the city would be liable for damage caused by removing the lateral support under the rule in Parke v. City of Seattle, 5 Wash. 1, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, and Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, therefore the corporation using the street for private gain by authority of the city would be liable in the same way.

While many authorities are cited by the appellants to the effect that the rights of a municipality in its streets are not inferior to the authority of a private owner over his own land, we think the rule, as recognized and laid down by this court in the cases hereinbefore cited, under our constitution, is conclusive of the question that private property shall not be damaged for a public use without just compensation. It is true that the word "damage" has been held to mean such damages as were recoverable at common law between individuals; but in view of the rule that the carrying away of land by its own weight is not consequential damage, but is an actual infringement and taking of property, we think the same rule should apply where the land is carried away by means of water which is released in a public street by any means which would amount to an actual taking and a resulting damage. Under statutes which are in substance the same as our constitutional provisions, the courts of Massachusetts have held, where the land of an adjacent owner is taken away by an [198] excavation on other lands, which excavation taps a subterranean stream of quicksand and water, permitting the soil of an adjoining owner to crack, that the parties making such excavation were liable for the damage: Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45. It was said in that case: "Whatever may be true of percolating waters,

we think that the defendants had no right to take away the soil of the plaintiff in land which they had not taken under the statutes, and that it is immaterial that the soil was removed by means of pumps from the trench into which it had fallen by its own weight, or had been carried by percolating water. We are unable to distinguish the case from one where the soil falls in from the surface in consequence of an excavation in the adjoining land": See, also, Trowbridge v. Brookline, 144 Mass. 139, 10 N. E. 796; Marsden v. City of Cambridge, 114 Mass. 490; Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. 489. Under this view, which we think is the correct one, it was not error prejudicial against appellants for the court to give the modification complained of.

The points made in appellants' brief, relating to the motion for a new trial and the instruction relating to the blast where no negligence is charged, are both disposed of by what we have said in connection with the points above discussed, and need not be further noticed.

It appears from the record that one of respondents' counsel, in arguing the question of damages to the jury, stated that respondents occupied to their tenants the relation of landlords, and in the event of the buildings getting out of order or condition, that the tenants would have a right of action against them; whereupon the following occurred: "Mr. Gilman: I desire an exception. The counsel has no right to argue the law to the jury. Mr. Allen: Of course I have. Now, gentlemen, let him take an exception. I will repeat it, and if he can get an exception out of it, let him take it—that Mr. Hamm and Mr. Farnandis and Mr. Morris [499] stand in the relation of landlords to these people, and in that we are responsible to them for the building getting out of repair and getting in bad repair, and that they have a right of action against them for that, if they choose to exercise it, and Mr. Gilman knows it."

At the close of the arguments, appellants' counsel orally requested the court to charge the jury: "That Mr. Farnandis and his associates have a certain interest in the buildings and the property; if that has been damaged by the railroad company the railroad company must pay for it. The tenants have a certain interest in the buildings. Mr. Farnandis is not responsible if the interest is affected and damaged by the railroad companies."

The request was refused and an exception allowed. The fact that the requested instruction was not in writing was waived by both the court and the counsel for respondents, and leave granted to appellants to reduce the request to writing, which was done after the jury had retired. In view of what had taken place between opposing counsel, it was clearly the duty of the court to give the instruction as requested. Upon the argument, respondents' counsel stated the measure of damages erroneously to the jury. The plaintiffs were clearly not liable to their subtenants for injuries to such tenants by the railroad companies without negligence or fault on the part of the plaintiffs, and when the court said nothing about the point in his instructions, and refused to correct the erroneous impression so forcibly and repeatedly stated, the jury were at liberty to believe that the statements of the respondents' counsel were correct, and to assess damages against the defendants for such items.

The plaintiffs themselves were tenants of the property under a long lease. If they as tenants were entitled to recover for the injuries alleged, their subtenants for the same reason had the same rights for any substantial injuries done them. Clearly, the plaintiffs were not liable to their subtenants for injuries done by third parties over whom the plaintiffs had no control. Counsel for respondents contend that [500] they have a right to argue the law to the jury. Conceding that they have, they must state it correctly, and when they make statements of law which are incorrect, it becomes the duty of the trial judge to correct them, especially upon material points when a proper request is made therefor. Other statements were made in the argument of the case which were outside the record and should not have been made, but which we do not deem of sufficient importance of themselves to warrant a reversal, and since they will probably not occur upon a new trial, we shall not discuss them. Since the judgment must be reversed for the error above stated, it is unnecessary to discuss the errors alleged as to the amount of the verdict.

The judgment appealed from is reversed, and a new trial ordered.

Root, Dunbar, Fullerton, Hadley, Rudkin, and Crow, JJ., concur.

The Various Questions as to the Right of Lateral Support involved in the principal case will be found discussed in the monographic note to Larson v. Metropolitan St. Ry. Co., 33 Am. St. Rep. 446-476. The right of lateral support is an absolute right of property, and the owner of land has a legal remedy against one who removes the natural support of the soil, which is based, not upon negligence, but upon the violation of the right of property: Schultz v. Bower, 57 Minn. 493, 47 Am. St. Rep. 630. Thus, if a railroad company, while excavating on its right of way, removes the lateral support of adjoining land, it is liable to the owner, without proof of negligence: Mosier v. Oregon Nav. Co., 39 Or. 256, 87 Am. St. Rep. 652. As to whether the right of lateral support applies to buildings, see Booth v. Rome etc. R. R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552; Schultz v. Bower, 57 Minn. 493, 47 Am. St. Rep. 630; Serio v. Murphy, 99 Md. 545, 105 Am. St. Rep. 316. And as to whether a landlord is liable to his tenant where a third person injures the leased building by removing the lateral support, see Serio v. Murphy, 99 Md. 545, 105 Am. St. Rep. 316.

WESTCOTT v. SEATTLE, RENTON AND SOUTHERN RAILWAY COMPANY.

[41 Wash. 618, 84 Pac. 588.]

STREET RAILWAYS, Liability of for Injuries by Dogs.—A street railway company has no right to carry dogs on a coach set apart for passengers, and if it does so, is answerable for damages caused to a passenger by a dog. (p. 1038.)

Peters & Powell, for the appellant.

Robert A. Devers, for the respondent.

617 Per CURIAM. This action was brought by the respondents, to recover for damages to the clothing and to the sensibilities of respondent, Margaret Westcott, while a passenger upon one of appellant's cars. These damages were inflicted by a four-months old puppy, brought into the car by another lady passenger, and permitted by the conductor to remain there. Verdict was rendered in favor of the respondents, judgment was entered thereon, and from such judgment this appeal is taken.

A street-car company has no right to carry dogs upon a coach that is set apart for passengers, and if it does so, and damage is caused by said dog, it must respond to the same. There being no errors in instructions, or in the admission of testimony, the judgment is affirmed.

The Care Required of Railroad Carriers is the highest practicable care which capable and faithful railroad men would exercise in similar

circumstances: St. Louis etc. Ry. Co. v. Stewart, 68 Ark. 606, 82 Am. St. Rep. 311; Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303. A common carrier is under a duty not only to carry passengers safely and expeditiously, but also to conserve by every reasonable means their convenience, comfort and peace throughout the journey: Birmingham etc. Ry. Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43. Street railway companies are common carriers of passengers, and as such are bound to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged, and are liable for slight negligence: Lincoln St. Ry. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736.

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5. **APPELLATE PRACTICE—Trial by Court without Jury.**—If a case is tried by the court without a jury, and no special finding of facts is made or requested, and the facts are not agreed upon, the conclusion of the judge stands as the verdict of a jury, and cannot be revised on appeal. (Ala.) Loyd v. Oates, 39.

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2. **JURISDICTION—Appearance.**—If lack of jurisdiction does not appear on the face of the record, the defendant may plead to the jurisdiction or unite a plea to the jurisdiction with his other defenses to the action, without waiving his right to insist on the lack of jurisdiction of the court, but this rule is limited to cases where the plea goes to defeat a recovery by the plaintiff, and does not extend to cases where the plea is joined with a cross-complaint or counterclaim, necessitating a trial on the merits of the issues tendered by the pleadings. (Neb.) Linton v. Heye, 556.

ARBITRATION AND AWARD.

1. **ARBITRATION AND AWARD—Construction and Intendments in Favor of.**—Where the parties to a dispute submit it to arbitration and have a full and fair hearing before the arbitrators, their award will be expounded favorably and every reasonable intendment made in its support. (Md.) Roberts Bros. v. Consumers' Can Co., 377.

2. **ARBITRATION AND AWARD—Finality of the Award.**—Where the parties to an arbitration have had a full and fair hearing before arbitrators, the court will not look into the merits of the award and review the findings of law or fact made by the arbitrators, nor substitute its opinion or judgment for theirs, but will require the parties to submit to the judgment of the tribunal of their own choice, and to abide by its award. (Md.) Roberts Bros. v. Consumers' Can Co., 377.

3. **ARBITRATION AND AWARD—Setting Aside Award Because of Refusal to Receive Testimony.**—Where the arbitrators refuse to open and consider a deposition taken by agreement of the parties and containing evidence material to their dispute, because such deposition was mailed by a notary to one of the parties instead of to the arbitrators, when such deposition, on its receipt, was promptly carried and delivered to one of the arbitrators, a court of equity will set the award aside. (Md.) Roberts Bros. v. Consumers' Can Co., 377.

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ASSAULT AND BATTERY.

ASSAULT AND BATTERY—Malice or Wrongful Intent.—A physician operating upon a patient while under an anesthetic and without procuring her consent to that operation, though she was placed under an anesthetic for another operation to which she had consented, is guilty of an assault and battery, though the operation was necessary, was skillfully performed, and without any evil intent. (Minn.) Mohr v. Williams, 462.

ATTACHMENT.

1. **ATTACHMENT—Successive Writs—Sale—Action for Restitution.**—If writs of attachment are issued in separate suits of several creditors against a common debtor, and successively levied on the same property, and motions to dissolve such attachments are overruled and the actions prosecuted to final judgment, and, from the order

sustaining the first attachment and final judgment an appeal is taken, on which the order is reversed and the final judgment is affirmed, no appeal being taken from the order sustaining the other attachments, and if, pending the appeal, the property attached, by stipulation of the parties, is sold to the first attaching creditor, under an order of sale issued on his judgment, and the proceeds applied thereon, the other judgments remaining wholly unsatisfied, an action for restitution will not lie against the first, in favor of the subsequent attaching creditors, but they may maintain an action for money had and received, to which the first attaching creditor may interpose a counterclaim or setoff, and in such case the statute of limitations does not begin to run until the first attachment was dissolved. (Neb.) First Nat. Bank v. Avery Planter Co., 541.

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2. **CORPORATIONS.**—Bank directors have no implied authority or presumed power to bind the corporation by their admissions.—(N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

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3. **TITLE OF BANK to Paper Sent for Collection.**—When a bank acts as agent for the collection of paper, the property does not pass from the depositor; but when the money has been collected and credited, the title passes. (Mich.) Garrison v. Union Trust Co., 407.

4. **BANKS AND BANKING—Ordinary Deposits—Limitation of Actions.**—An ordinary deposit of money in a bank for which a cer-

tificate is issued is not a loan thereof to the bank, and the statute of limitations will not commence to run against an action on such certificate until demand for payment has been made, and such demand need not be made within the period of limitation computed from the date of the deposit. (Iowa) Elliott v. Capital City State Bank, 198.

Lien of Bank.

5. **LIEN OF BANK on Proceeds of Draft Sent for Collection.**—Where a draft is sent to a bank by a correspondent for collection, the collecting bank has a lien on the proceeds of the draft for the general balance of its account with its correspondent, unless it has notice that the draft is not the property of the correspondent. (Mich.) Garrison v. Union Trust Co., 407.

6. **LIEN OF BANK on Proceeds of Draft Sent for Collection.**—Where a state bank sends a draft to a savings bank for collection, indorsing it generally, and the savings bank then sends it to a private bank, indorsing it "Pay to the order of any state or national bank," and stamping a collection number on its face, the private bank, upon receiving payment of the draft has, as against the state bank, a lien on the proceeds for the general balance of its account with the savings bank, although the savings bank has become insolvent when notice of the collection reaches it. (Mich.) Garrison v. Union Trust Co., 407.

7. **LIEN OF BANK—Disobedience of Instructions.**—If a sight draft drawn against a car of grain in transit is accompanied with instructions to "return at once if not paid," and the bank to which it is sent, in accordance with its custom, holds the draft until the car arrives, when it is paid, the bank, by so doing, does not forfeit its right to a lien on the proceeds for the balance of its account with the forwarding bank. (Mich.) Garrison v. Union Trust Co., 407.

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BILLS AND NOTES.

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1. **BILLS AND NOTES—Rubber Stamp Indorsement.**—If the name of the drawee is stamped on the back of a draft with a rubber stamp by one having authority to do it and with intent to indorse the instrument, the indorsement is valid, but it does not prove itself. (N. C.) Mayers v. McRimmon, 879.

2. **BILLS AND NOTES—Necessity of Indorsement.**—The indorsement of a negotiable instrument is essential to constitute a person a holder in due course. (N. C.) Mayers v. McRimmon, 879.

3. **BILLS AND NOTES—Proof of Indorsement.**—An indorsement does not prove itself, but must be established by proper evidence. (N. C.) Mayers v. McRimmon, 879.

4. **NEGOTIABLE INSTRUMENT, Presumption as to Place of Making and Indorsing.**—A note dated and payable in New York is presumed to have been made and indorsed in that state. (N. Y.) Chemical Nat. Bank v. Kellogg, 717.

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5. **NEGOTIABLE INSTRUMENTS.—Each Indorsement of a Promissory Note is a Separate Contract,** standing apart from that made by the maker or any other indorser. (N. Y.) Chemical Nat. Bank v. Kellogg, 717.

6. **NEGOTIABLE INSTRUMENT—Conflict of Laws.—The Validity of a Contract of Indorsement** is ordinarily determined by the law of the place where the indorsement is made. (N. Y.) Chemical Nat. Bank v. Kellogg, 717.

7. **NEGOTIABLE INSTRUMENTS—Laws of Another State, Estoppel to Urge.**—A wife who, in New Jersey, indorses a negotiable instrument, on its face dated and by its terms payable in New York, cannot, as against a purchaser of the instrument in the latter state, defend on the ground that it is a New Jersey contract, and by the laws of that state she is not liable thereon because of her coverture, if the purchaser had no notice that the instrument was made or indorsed in another state. (N. Y.) Chemical Nat. Bank v. Kellogg, 717.

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8. **SURETY ON NOTE—Primary Liability.**—The liability of a surety on a note is primary, for he is, by the terms of the instrument, absolutely required to pay it. (N. C.) Rouse v. Wooten, 875.

9. **SURETY ON NOTE—Right to Notice of Dishonor.**—A surety on a note is not entitled to notice of dishonor. (N. C.) Rouse v. Wooten, 875.

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CARRIERS.

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1. **CARRIERS—Passengers—Person Approaching Train.**—If a person with a mileage ticket stops over at a flag station until the next train, leaving his trunks in the custody of the railroad company in its warehouse situated on its right of way and used for freight purposes, he is, after rechecking his baggage at the warehouse and starting across the platform to take the approaching train, a passenger. (N. C.) Pineus v. Atlantic Coast Line R. R. Co., 856.

2. **CARRIERS—Safe Station Premises—Flag Station.**—The rule that the duty of a railroad company to keep safe station premises extends to all who rightfully come there in pursuance of the invitation which it holds out to the public, and to all who come there on legitimate business to be transacted with its agent, applies to flag as well as regular stations. (N. C.) Pineus v. Atlantic Coast Line R. R. Co., 856.

3. **CARRIERS—Discrimination in Selling Tickets.**—A common carrier must serve the public without discrimination, and sell tickets and accommodations in the order of application. Therefore, if a purser on a ship declines to furnish a berth to a passenger when he applies therefor, but furnishes one to others subsequently applying, and the passenger thus discriminated against is compelled to sit up all night, the carrier is liable in damages. (N. C.) Patterson v. Old Dominion S. S. Co., 848.

4. **CARRIERS—Passenger's Right to have Train Stop at Destination.**—If a passenger, before buying a ticket, asks the agent whether a certain train stops at his destination, and is told, and given a time-table showing, that it does stop there, he has a right to assume that it will, and his ejection at a preceding station is wrongful. (N. J. L.) McDonald v. Central R. R. Co., 672.

5. **CARRIERS—Initial Railway as Agent for Connecting Lines.**—If a person buys a coupon ticket over connecting railways, knowing that in issuing it the initial carrier acts only as agent of the others, the relation of carrier and passenger does not exist between him and the first railway after the train leaves its road. (N. J. L.) McDonald v. Central R. R. Co., 672.

6. **CARRIERS—Eviction of Passenger.—Damages for the Indignity** and consequent injury to his feelings may be allowed a passenger for his wrongful eviction from a train. (N. J. L.) McDonald v. Central R. R. Co., 672.

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8. **STREET RAILWAYS, Liability of for Injuries by Dogs.**—A street railway company has no right to carry dogs on a coach set apart for passengers, and if it does so, is answerable for damages caused to a passenger by a dog. (Wash.) Westcott v. Seattle etc. Ry. Co., 1038.

9. **CARRIERS.—The Rule of Res Ipsa Loquitur is Based** on the apparent fact that the accident could not have happened without negligence on the part of the carrier; or, upon the literal meaning of the expression, that the thing itself speaks, and shows prima

facie that the carrier was negligent. (Wash.) Firebaugh v. Seattle Elec. Co., 990.

10. **STREET RAILWAYS, Negligent Presumption of from Accident.**—When the controller of a street-car blows out or burns out, the law presumes that such blowing or burning out resulted from some defect of the controller or other appliance of the carrier or means used by the company in its operation, and it devolves on the company to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented. (Wash.) Firebaugh v. Seattle Elec. Co., 990.

11. **NEGLIGENCE.—The Action of a Passenger Placed in Sudden Apparent Peril** does not forfeit or change his right to rely on the presumption that the accident to which the apparent peril was due arose from the negligence of the carrier. (Wash.) Firebaugh v. Seattle Elec. Co., 990.

12. **NEGLIGENCE, Presumption of from Accident, When not Rebutted.**—In an action against a street railway corporation, the testimony of witnesses that they did not know what caused the controller to blow out or explode, and that a blowing out will sometimes occur, the cause of which could not be ascertained, does not rebut the presumption of the negligence of the corporation, especially where there is testimony of different causes for the explosion which might have been controlled or remedied by the corporation. Under these circumstances, it is for the jury to determine whether the presumption of negligence has been rebutted. (Wash.) Firebaugh v. Seattle Elec. Co., 990.

Carriers of Goods.

13. **CARRIERS—Evidence of Delivery of Freight.**—The fact of the delivery of freight to a common carrier for transportation may be proven by oral testimony, although a receipt or bill of lading has been given by the carrier and is still in existence. (Fla.) Atlantic Coast Line R. R. Co. v. Dexter, 116.

14. **CARRIERS—Limitation of Liability.**—The acceptance by a shipper or his agent of a receipt or bill of lading containing a limitation of the carrier's liability is binding on him, when the limitation is not illegal or unreasonable, and it is not essential to the validity of such a limitation that it be shown that the shipper was aware of it, or that he had read it, or that it had been explained to him, or had his attention called to it, provided the carrier made use of no improper means to prevent his noticing or objecting to it and every shipper is exclusively presumed in such case to have read and assented to the provisions of the receipt or bill of lading given him, whether he in fact assented or not. (Fla.) Atlantic Coast Line R. R. Co. v. Dexter, 116.

Carriers of Livestock.

15. **CARRIERS OF LIVESTOCK—Care During Carriage—Burden of Proof.**—If livestock is shipped by common carrier and the shipper assumes to take care of it during its transportation, he has the burden of proving that its loss was the result of the carrier's negligence, whether such negligence consists in failing to furnish proper cars, or in the transportation of the stock. (Fla.) Atlantic Coast Line R. R. Co. v. Dexter, 116.

16. **CARRIERS OF LIVESTOCK—Limitation of Liability.**—Provisions in contracts for the carriage of livestock limiting the amount for which the carrier is to be liable in any event for the complete loss of or injury to, such stock while in its charge, are universally recog-

nized to be reasonable, valid and binding on the parties. (Fla.) Atlantic Coast Line R. R. Co. v. Dexter, 116.

17. **NEGLIGENCE.—The Failure to Comply with a Statute** making it the duty of a railway carrying cattle to unload them after confinement for the period of twenty-eight consecutive hours for rest, feed and water is negligence per se, rendering the carrier liable for the resulting injuries to the animals. (Wash.) Reynolds v. Great Northern Ry. Co., 883.

18. **NEGLIGENCE, Complaint Showing a Violation of Law a Sufficient Plea of.**—Where the complaint shows that the defendant railway corporation violated the law requiring it to unload cattle after confinement of twenty-eight consecutive hours, it need not contain any further averment of the defendant's negligence. (Wash.) Reynolds v. Great Northern Ry. Co., 883.

19. **CONTRACTS.—If a Contract Exempts a Carrier from Liability for Failure to Unload Stock** after twenty-eight consecutive hours of confinement, the exemption is void. (Wash.) Reynolds v. Great Northern Ry. Co., 883.

20. **CARRIERS OF LIVESTOCK, Failure of to Unload for Resting.**—A provision in a contract for the carrying of livestock that the shipper will unload and load the stock at his own expense and risk at any place where the same may be unloaded for any purpose does not relieve the carrier from the duty of unloading after twenty-eight consecutive hours of confinement for resting, food and water, where the carrier does not give the shipper an opportunity to unload his cattle for such purposes. (Wash.) Reynolds v. Great Northern Ry. Co., 883.

21. **CARRIERS OF LIVESTOCK—Manner of Delivery.**—It is the duty of a carrier of cattle to deliver them to the consignee in or through inclosed lots or yards convenient to the place of unloading, and if they are scattered by reason of being unloaded in an improper place, the carrier is liable for the damages occasioned thereby. (Wash.) Reynolds v. Great Northern Ry. Co., 883.

22. **CARRIERS OF LIVESTOCK, Presenting a Claim Against, When in Time.**—A condition in a contract for the shipping of livestock that claims for damages must be presented within ten days is sufficiently complied with when, the next day after being damaged, the shipper talked with an agent of the carrier announcing the desire to put in a claim for damages and that agent's telling him to see another, and the latter, being seen, directing the shipper to see a third agent, who, on being seen, requests the shipper to write him a letter, and this letter is accordingly written, though not within the ten days. (Wash.) Reynolds v. Great Northern Ry. Co., 883.

23. **CARRIERS OF LIVESTOCK, Claim by for Damages, When Sufficient.**—A claim against a carrier of livestock making a direct demand for damages then known to have been suffered, and stating that there are still lost thirty-five head for which the shipper had offered two dollars per head, is sufficient to sustain a claim for depreciated in value by reason of the straying off of lost cattle. (Wash.) Reynolds v. Great Northern Ry. Co., 883.

24. **CARRIERS OF LIVESTOCK—Breach of Contract.**—In an action against a carrier for breach of contract to transport livestock, a count in plaintiff's complaint in statutory form is broad enough to entitle him to recover thereon, though the evidence shows that shipment was made under a bill of lading containing special stipulations. (Ala.) Southern Ry. Co. v. Webb, 45.

25. **CARRIERS OF LIVESTOCK—Breach of Contract—Damages.** In an action against a carrier for breach of contract to transport livestock, which the carrier failed to deliver according to the contract, the plaintiff is entitled to recover damages for the decreased weight of the stock and their decreased market value, resulting from their detention, provided there is no stipulation in the contract for a different measure of damages. (Ala.) Southern Ry. Co. v. Webb, 45.

26. **CARRIERS OF LIVESTOCK—Agent of Shipper.**—If a shipper of livestock in a letter to an agent of the carrier directs as to whom the stock are consigned, another person engaged by the shipper to deliver the stock to the carrier is not the authorized agent of the shipper to so change the contract of carriage as to direct delivery of the stock to a person other than the one originally designated by the shipper. (Ala.) Southern Ry. Co. v. Webb, 45.

27. **CARRIERS OF LIVESTOCK—Duty to Deliver to Consignee Named by Shipper.**—A carrier must deliver livestock shipped over his line to the consignee designated in the contract of carriage, and the delivery of such stock to another person constitutes a conversion for which the carrier is liable in any damages approximately resulting from the wrongful delivery. (Ala.) Southern Ry. Co. v. Webb, 45.

28. **CARRIERS OF LIVESTOCK—Duty to Shipper—Liability for Wrongful Delivery.**—The failure of a shipper of livestock to accompany and unload it on its arrival at its destination, as provided by the contract of carriage, does not relieve the carrier from liability for delivery of the livestock to another person than the one named in such contract of carriage. (Ala.) Southern Ry. Co. v. Webb, 45.

29. **CARRIERS OF LIVESTOCK—Delivery to Wrong Person.**—If a carrier of livestock wrongfully delivers it to a person other than the one named in the contract of carriage, thereby working a conversion, it is immaterial to the carrier's liability that he was entitled under the contract to retain the livestock carried until the freight on it was paid. (Ala.) Southern Ry. Co. v. Webb, 45.

30. **CARRIERS OF LIVESTOCK—Liability for Misdelivery.**—A provision in a contract for the carriage of livestock that, as a condition precedent to the right of the shipper to recover any damages for any loss or injury to such livestock, he must give notice in writing of his claim therefor, is not applicable, when the shipper seeks to recover from the carrier for delivering the livestock shipped to another person than the consignee named in such contract of carriage. (Ala.) Southern Ry. Co. v. Webb, 45.

31. **CARRIERS OF LIVESTOCK—Liability for Misdelivery.**—If a carrier of livestock wrongfully delivers it to a person other than the consignee named in the contract of carriage, the shipper is entitled to recover a sum which he has been required to pay the person to whom the stock was delivered for feeding it until he could regain possession thereof. (Ala.) Southern Ry. Co. v. Webb, 45.

32. **CARRIERS OF LIVESTOCK—Liability for Misdelivery.**—If a carrier of livestock wrongfully delivers it to a person other than the consignee named in the contract of carriage, the shipper is not entitled to recover expenses incurred by him on a trip to the place of destination of the livestock, in order to recover it, as such expense is not a proximate consequence of the carrier's breach of contract. (Ala.) Southern Ry. Co. v. Webb, 45.

33. **CARRIERS OF LIVESTOCK.**—If a carrier of livestock wrongfully delivers it to a person other than the consignee named in the contract of carriage, he is liable for the difference in the market

value of the livestock at the place of destination, from the time of its arrival to the time that the shipper regains possession of it, although the contract of carriage stipulates that should damage occur for which the carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed a certain sum per head of the stock shipped. (Ala.) Southern Ry. Co. v. Webb, 45.

CASHIER'S BOND.

See Principal and Surety.

CHAMPERTY.

See Attorney and Client, 2.

CHARITIES.

CHARITABLE TRUSTS are not within the rule against perpetuities. (N. H.) Merrill v. American Baptist Missionary Union, 632.

See Annuities, 2.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES—Failure to Record—Effect on Creditors.—The term "creditors" as used in a statute making an unrecorded chattel mortgage void as to creditors where the mortgagor retains possession of the property, applies only to such creditors as by legal process have fastened a lien or charge upon the property for the satisfaction of their debts. (Neb.) Folsom v. Peru Plow etc. Co., 537.

2. CHATTEL MORTGAGES—Death of Mortgagor—Rights of Creditors.—The term "creditors" as used in a statute making an unrecorded chattel mortgage void as to creditors where the mortgagor retains possession of the property, applies only to such creditors as have acquired a lien upon the property while in possession of the mortgagor and before the filing of the mortgage for record, and if the mortgagor in an unrecorded chattel mortgage dies in possession of the mortgaged property, such mortgage is void only as to those creditors whose claims have been adjudicated and allowed before the mortgage was filed for record, and before the mortgagee had reduced the property to his possession, and an administrator, as representative of the creditors of the deceased mortgagor, can invoke the statute only in aid of such creditors as have had their claims adjudicated and allowed. (Neb.) Folsom v. Peru Plow etc. Co., 537.

CHILLING BIDS.

See Contracts, 1.

CONFLICT OF LAWS.

See Bills and Notes, 5-7.

CONSPIRACY.

1. CONSPIRACY—Restraint of Trade.—Whether a conspiracy formed for the purpose of injuring or driving one out of business be lawful or unlawful, so far as its purpose is concerned, if unlawful means are used to effectuate such purpose, the conspiracy becomes actionable, and any loss or damage suffered in consequence may be recovered. (Ky.) Standard Oil Co. v. Doyle, 331.

2. **CONSPIRACY in Restraint of Trade.**—It is unlawful for those forming a conspiracy to injure another's business as an oil merchant, to obstruct, harass, and annoy his employés when engaged in the discharge of their duties in selling and distributing oil to his customers, or to threaten such customers to shut them up in their business if they continue to deal in such oil, or to cause and procure false and injurious reports concerning such merchant and his business to be circulated in the vicinity, or to procure such merchant's arrest and prosecution on false charges in connection with his business in the sale of oils for the purpose of estranging his acquaintances, customers and patrons. (Ky.) Standard Oil Co. v. Doyle, 331.

3. **CONSPIRACY Consists of a combination** between two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. (Ky.) Standard Oil Co. v. Doyle, 331.

4. **CONSPIRACY—Declarations as Evidence.**—A conspiracy being once established, or facts having been adduced which justify the inference of the existence of a conspiracy, the acts and declarations of each conspirator, made pursuant to, and in furtherance of such conspiracy after its formation and before its completion, are competent evidence against all of the conspirators. (Ky.) Standard Oil Co. v. Doyle, 331.

5. **CONSPIRACY.—Acts or Declarations** by one of the conspirators after the completion of the purpose for which the conspiracy was formed can be used as evidence against him alone. (Ky.) Standard Oil Co. v. Doyle, 331.

6. **TRIAL—Verdict—Assessment of Damages for Conspiracy.**—In an action to recover damages resulting from a conspiracy to injure plaintiff in his business as an oil merchant, to which a corporation and several individuals are made parties defendant, it is within the province of the jury to determine from the evidence which of the conspirators was most in fault and which would be benefited most by the formation and success of the conspiracy, and to assess damages in proportion accordingly. (Ky.) Standard Oil Co. v. Doyle, 331.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW.—The Right to Carry on a Business** and carry out contracts made in the course thereof is a property right within the constitutional guaranty of the right to acquire and protect property. (Ky.) Underhill v. Murphy, 262.

2. **CONSTITUTIONAL LAW—Sale of Milk from Cows Fed on Still Slop.**—A statute forbidding the sale of milk from cows fed on "still slop, brewers' slop, or brewers' grains," is a valid police regulation. (Ky.) Sanders v. Commonwealth, 219.

3. **CONSTITUTIONAL LAW—Penalty for Using Trade Labels.**—A statute providing for the registration of a label by any organization of persons, to designate the wares upon which its members have expended labor, and providing that, in the event of an unlawful use of such label by a person other than a member, the organization may, in addition to full compensation for the injury, recover from the offender a penalty of not less than two hundred nor more than five hundred dollars, for the use and benefit of the organization, is unconstitutional as authorizing the taking of property without due process of law, in that it confers on the plaintiff the power of fixing, within the limits prescribed, the amount of the penalty to be exacted for its own use. (N. J. L.) Cigarmakers' International Union v. Goldberg, 662.

4. **POLICE POWER.**—It belongs primarily to the legislative department, in the exercise of the police power of the state, to determine what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, subject to the power of the courts to adjudge whether any particular law is an invasion of rights secured by the constitution. (Ala.) Equitable Loan etc. Co. v. Edwardsville, 34.

See Adverse Possession, 1.

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CONTRACTS.

Construction.

1. **COURTS Should Construe Contracts so as to Sustain** rather than defeat them, if this can be reasonably done. (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

2. **CONTRACTS—Construction—Parol Evidence.**—If a written contract is ambiguous or obscure, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject matter of the contract, of the relation of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract, may be received to enable the court to make a proper interpretation of the contract. (Fla.) L'Engle v. Scottish Union etc. Ins. Co., 70.

3. **CONTRACTS—Repugnant Clauses.**—While clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet a proviso utterly repugnant to the body of the contract and irreconcilable with it will be rejected. (N. C.) Jones v. Casualty Co., 843.

4. **CONTRACT, Construction of is for the Court.**—If a contract is in writing and unambiguous, its construction is for the court, without submission to the jury. (Wash.) Larson v. American Bridge Co., 904.

Validity.

5. **CONTRACT to Chill Bidding at Public Sale.**—Two persons who desire to purchase the same property at public sale cannot make a valid agreement that one shall buy for the benefit of both, thereby preventing competitive bidding between themselves, although they do not design to purchase the property at less than its value. (Mich.) Fletcher v. Johnson, 401.

6. **CONTRACTS to Procure Divorce—Public Policy.**—Any agreement conditioned on the obtainment of divorce, or intended or calculated to facilitate its obtainment, is void. (Iowa) Barngrover v. Pettigrew, 206.

7. **CONTRACT Against Public Policy—Recovery on Quantum Meruit.**—The law will not imply a promise to pay for services which

are in derogation of public policy, and if the plaintiff cannot establish his cause of action without relying on an illegal contract, or on services which by their very nature contravene public policy, he cannot recover on a quantum meruit. (Iowa) Barngrover v. Pettigrew, 206.

8. **A CONTRACT Lacking in Mutuality is not Enforceable.** (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

9. **CONTRACT in Restraint of Trade—Agreement to Employ Only the Members of a Designated Association.**—A contract made by an employer of labor by which he binds himself to employ and retain only members in good standing in a single labor union is consonant with public policy and enforceable in the courts, and a note given as collateral security for the performance of the contract, to be applied as liquidated damages for its violation, is valid and enforceable. (N. Y.) Jacobs v. Cohen, 730.

Note.

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one not a party to, when may and when may not recover for a breach of, 703.

CONTRIBUTION.

CONTRIBUTION—Joint Tort-feasors.—If a money judgment against attaching creditors as joint tort-feasors has been satisfied by one of them, contribution will be enforced if it appears that they acted in good faith without any intention of committing a trespass, and the basis of contribution in such case is the ratio the claims of the several attaching creditors bear to each other. (Neb.) First Nat. Bank v. Avery Planter Co., 541.

Note.

Conveyance, conditions, reservations, and exceptions in, when may be disregarded, 776.
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technical words in should not prevail against the intent of the grantor, 771.

CORPORATIONS.

Conveyance by Corporation.

1. **CORPORATIONS—Conveyances by—Acquiescence in Informalities by Stockholders.**—Formalities required for the valid execution of a conveyance by a corporation are for the benefit of its stockholders, and if they acquiesce in a conveyance in which the necessary formalities are disregarded, other persons cannot complain thereof. (Ala.) West Point Mining etc. Co. v. Allen, 60.

Power of Officers—Street Assessments.

2. **CORPORATIONS—Power of General Manager.**—The authority of a general manager of a corporation, organized for the care and sale of livestock to a certain market, to conduct its ordinary business, is not broad enough to empower him to sign a petition for paving a city street, and thus bind the real estate of the corporation, abutting thereon, with the cost of such improvement. (Neb.) Trephagen v. City of South Omaha, 570.

3. **CORPORATIONS—Street Assessments.**—The act of signing the name of a corporation to a petition for opening a highway over its real property, or the paving of a street abutting thereon, whereby a special tax will be assessed and become a charge against the property of the corporation, is one which falls within the managing powers of the board of directors, who are the managing agents of the corporation. The general manager of the corporation has no such power unless it is especially delegated to him. (Neb.) Trephagen v. City of South Omaha, 570.

Notice to Officer.

4. **CORPORATIONS—Notice to Officer.**—The rule that notice to the treasurer of a corporation is notice to the corporation does not apply to the misappropriation by such treasurer of trust funds on deposit with the corporation, when the facts to be imputed relate to an independent fraudulent act of such treasurer. (N. H.) Brookhouse v. Union Pub. Co., 623.

Powers of Corporation—Ultra Vires.

5. **CORPORATIONS—Right to Contract Debts and Borrow Money.** Corporations, other than those organized for governmental purposes, have the right to contract debts, borrow money and give the customary evidences of debt and the customary security therefor. Such power is only limited by statute, or the provisions of their charters, and need not be expressly granted. (Ky.) Fidelity Trust Co. v. Louisville Gas Co., 302.

6. **CORPORATIONS—Powers—Right to Guarantee Bonds.**—Although the charter of a gas company provides that it may issue bonds for a certain sum and execute a mortgage to secure them, this does not so limit the power of the corporation to contract indebtedness as to prevent it from guaranteeing the payment of bonds worth a much larger sum, sold by it after it has lawfully acquired them

in the conduct of the business for which it was organized. (Ky.) Fidelity Trust Co. v. Louisville Gas Co., 302.

7. **A CORPORATION Possesses Only Such Powers** as are expressly granted, with such incidental and implied powers as are necessary to carry into effect those expressly granted. (Md.) West Maryland R. R. Co. v. Blue Ridge Hotel Co., 362.

8. **AN INCIDENTAL POWER of a Corporation is One** that is directly and immediately appropriate to the execution of the specified powers granted, and not one that has only a slight or remote relation to it. It can in no case enlarge the express powers, and thereby warrant the corporation in devoting its efforts or capital to other purposes than such as its charter expressly authorizes, or engaging in collateral enterprises not directly, but only remotely, connected with its specific corporate purpose. (Md.) West Maryland R. R. Co. v. Blue Ridge Hotel Co., 362.

9. **CORPORATIONS—Contracts Ultra Vires not Cured by Words Intended to Disguise Their Purpose.**—The fact that a railway company stipulated to allow such sums as commissions on its receipts as would make good a specified deficiency cannot disguise the real character of the transaction and control the validity of the obligation. If the contract would be ultra vires if the deficiency were to be made good from the general receipts, it cannot be rescued from invalidity by calling payment commissions from the traffic receipts. (Md.) West Maryland R. R. Co. v. Blue Ridge Hotel Co., 362.

10. **RAILWAY CORPORATIONS—Ultra Vires Contract Relating to Summer Hotel.**—A contract by which a railway corporation guarantees the payment of interest and dividends on the bonds and stock of a hotel company on the line of its road is ultra vires and void, though it is expected that the construction and operation of such hotel will greatly increase the receipts of the railway, and the moneys pledged to make the guaranty good are in the contract designated as receipts or commissions upon receipts of the railway corporation for freight and charges to and from stations in close proximity to such hotel. (Md.) West Maryland R. R. Co. v. Blue Ridge Hotel Co., 362.

11. **CORPORATIONS—Ultra Vires—Receipts of Fruits of Contract Which Will not Estop Pleading of.**—When a railway corporation has entered into a contract guaranteeing the payment of interest and dividends on the bonds and stock of a summer hotel company, the fact that the former corporation has benefited from increased receipts from freight and passengers due to the construction and maintenance of the hotel will not estop it from pleading that its contract is ultra vires. To create such an estoppel the moneys received must have come from the other party to the contract. (Md.) West Maryland R. R. Co. v. Blue Ridge Hotel Co., 362.

Transfer of Stock—Injunction and Specific Performance.

12. **CORPORATIONS—Transfers of Stock.**—The ownership of stock in a corporation passes from the seller to the buyer by force of the contract of sale, and not by operation of law, as soon as such contract is fully consummated, but as between the buyer and the corporation, or interested third parties without notice, the buyer does not ordinarily acquire all the rights of a stockholder until the transfer is entered on the corporate records. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

13. **CORPORATIONS—Transfer of Title to Stock—Estoppel to Deny.**—If a certificate of stock, regular in form and properly exe-

cuted, recites that the person to whom it is issued is the owner of certain shares of fully paid-up and nonassessable stock in a corporation, it is estopped to deny the validity of the stock as against a purchaser from such person in good faith and for value, and cannot refuse to recognize such purchaser as a stockholder, or to record and transfer the stock on its books on the ground that the certificate was illegally acquired by such vendor, who paid nothing for the stock. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

14. **CORPORATIONS—Transfers of Paid-up Stock.**—If certificates of stock in a corporation state upon their face that the shares have been fully paid-up, the corporation will be estopped from denying the truth of this representation, and cannot charge the purchaser and transferee with further liability, although the shares have never in fact been paid up. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

15. **CORPORATIONS—Transfer of Stock.**—If corporate stock is valid in the hands of a transferee for value on the ground of estoppel against the corporation, he is entitled to have the stock transferred to him on the books of the corporation, although the law of the state creating it provides that no transfer of stock shall be valid, except as between the parties, until such transfer shall have been regularly entered upon the books of the corporation. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

16. **CORPORATIONS—Transfer of Stock**—A statute providing that no transfer of stock shall be valid except as between the parties thereto, until such transfer shall have been regularly entered on the books of the corporation, is not intended to limit the power of the corporation to agree with a bona fide purchaser of its stock to enter the transfer on its books upon demand and notice, when no legal reason exists for its refusal. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

17. **CORPORATIONS—Transfer of Stock.**—A statutory provision that no transfer of stock shall be valid, except as between the parties thereto, until such transfer shall have been regularly entered on the books of the corporation, if not complied with, does not prevent a valid sale of stock for some purposes, or justify the corporation in captiously refusing to allow an entry on its books which shall make the sale valid for all purposes. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

18. **CORPORATIONS—Transfer of Stock.**—The right of a bona fide purchaser of corporate stock for value to a transfer thereof on the books of the corporation is not a matter relating to its internal management, cognizable only in the courts of the state where the corporation was created, but is a contractual right accruing to the purchaser upon his acquisition of the stock and enforceable in another state where the corporation may properly be made a party. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

19. **CORPORATIONS—Injunction on Sale of Stock—Parties.**—One who has given notice to a corporation of his ownership of its stock is not bound by a subsequent judgment in a suit to which he is not a party, enjoining a sale of stock by his vendor. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

20. **CORPORATIONS—Transfer of Stock—Specific Performance.**—A purchaser of corporate stock is not confined to an action for damages, for the wrongful refusal of the corporation to transfer the stock to him on its books, but may require it, by bill for specific perform-

ance to transfer the stock on its books, especially when the real and prospective value of the stock depends upon the future development and management of the corporate business. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

21. **CORPORATIONS—Transfer of Stock—Laches.**—A bona fide purchaser of stock in a corporation is not guilty of laches in delaying suit to compel the corporation to transfer the stock to him on its books, when it does not conclusively appear that such delay has been unreasonable, or that the corporation has been in any way prejudiced thereby. (N. H.) Westminster Nat. Bank v. New England Electrical Works, 637.

Foreign Corporations.

22. **FOREIGN CORPORATION—Noncompliance with Law—Validity of Contracts.**—If a statute provides that foreign corporations, before transacting business in the state, shall perform specified acts, and declares that corporations which do business in the state without complying with such conditions shall be subject to a fine and cannot maintain an action in the courts of the state, a contract entered into by a corporation and partly performed before it has complied with the statute is void, and an action cannot be maintained for a breach of the contract, although prior to the commencement of the suit the law is complied with. (Mo.) Tri-State Amusement Co. v. Forest Park etc. Co., 511.

23. **FOREIGN CORPORATION—Noncompliance with Law—Validity of Contracts—Comity.**—Contracts entered into by a foreign corporation in the state of its domicile, with a citizen of this state, if valid there and not prohibited by the law here, may be enforced in this state as a matter of comity, although the corporation has not complied with the statutes prohibiting it to do business in this state without first complying with their terms. (Mo.) Tri-State Amusement Co. v. Forest Park etc. Co., 511.

24. **FOREIGN CORPORATION—Noncompliance with Law—Validity of Contracts.**—If a statute prohibits foreign corporations from doing business in the state without first having complied with the law, this prohibition is as effective to make the contracts of such corporations void as though the statute in terms so declared them; for if an act is prohibited or declared unlawful, it is not necessary for the law to declare the act or contract void; an unlawful act is itself void. (Mo.) Tri-State Amusement Co. v. Forest Park etc. Co., 511.

Note.

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COTENANCY.

See Tenancy in Common.

COURTS.

JURISDICTION—Parties.—No court can adjudicate directly upon a person's rights without his being actually or constructively before the court. (N. H.) Moore v. Maryland Casualty Co., 647.

Note.

Courts-martial, prohibition, writs of, whether will issue against, 936.

CRIMINAL LAW.

Infamous Crimes.

1. **CRIMINAL LAW—Infamous Crime.**—The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery, and those other offenses classified as crimen falsi, which impressed upon their perpetrator such a moral taint that, to permit him to testify in legal proceedings, would injuriously affect the administration of justice. (Md.) Gantee v. Bond, 385.

2. **CRIMINAL LAW—Infamous Crime, What is not.**—The crime on the part of an attorney engaged in prosecuting a claim for pension of collecting and retaining a greater fee than ten dollars, though punishable at the discretion of the court by a term of imprisonment, which the court might, in the exercise of its power, have required him to serve in the penitentiary, does not involve that degree of moral tur-

pitude required to make it an infamous crime at the common law. (Md.) Gentee v. Bond, 385.

3. **CRIMINAL LAW—Infamous Crime—State Court not Bound by the Views of the National Courts on the Subject.**—Though the crime of receiving and retaining more than ten dollars for services in procuring a pension may be regarded in the federal court in which the trial and conviction therefor took place as an infamous crime the state court is not bound by the views of the national court on that subject. (Md.) Gantee v. Bond, 385.

Crimes Malum Prohibitum.

4. **CRIMINAL LAW.—An Offense Malum in Se** is one which is naturally evil, while an act malum prohibitum is wrong only because made so by statute. (N. C.) State v. Horton, 818.

5. **CRIMINAL LAW—Malum Prohibitum.**—Hunting on premises without the written permission of the owner, which, by a local statute, is made a misdemeanor or punishable by fine, is an offense malum prohibitum. (N. C.) State v. Horton, 818.

Former Jeopardy.

6. **CRIMINAL LAW—Jeopardy—Separate Offenses.**—The burglarious entry of a house and the shooting of the owner thereof therein by the same person after the burglarious act has terminated do not constitute a single transaction out of which two offenses cannot be carved so as to render a conviction for the shooting a bar to a prosecution for the burglary. (Ky.) Mann v. Commonwealth, 289.

7. **CRIMINAL LAW—Jeopardy—Separate Offenses.**—A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had. (Ky.) Mann v. Commonwealth, 289.

Trial—Accused as Witness.

8. **CRIMINAL TRIALS—Evidence.**—The general rules as to the admissibility of evidence are the same in criminal as in civil proceedings. (N. H.) State v. Danforth, 600.

9. **CRIMINAL LAW—Presumptions.**—It is presumed that a defendant on trial exercised his right and offered himself as a witness, and made himself a subject of cross-examination and comment. (N. H.) State v. Danforth, 600.

CRUELTY TO ANIMALS.

See Municipal Corporations.

DAMAGES.

DAMAGES—Verdict, When not Excessive.—In an action to recover for personal injuries, a verdict in favor of the plaintiff for six thousand dollars is not excessive when it appears that the injury was to the bone of his ankle joint, that he was long in the hospital under treatment, that pieces of bone were extracted, that a discharging sore continued up to the time of the trial, and that the joint remained stiff, and the evidence indicates that permanent anchylosis has resulted. (Wash.) Whelan v. Washington etc. Co., 1006.

See Sales, 10.

DANGEROUS PREMISES.

See Negligence, 8, 9.

Note.

Deceit, essential elements to sustain actions for, 708.
liability of manufacturer or seller of articles for, 710.
silence, when may amount to, 708.

DEEDS.

1. **DEEDS—Warranty—After-acquired Title.**—If a person at the time of conveying land by deed of warranty has no title, but afterward acquires one, such title inures and passes eo instanti to his grantee, and this rule applies when the warranty is such as the law implies from the employment of statutory words. (Ala.) New England Mortgage Security Co. v. Fry, 62.

2. **DEEDS—Warranty—After-acquired Title—Subrogation to Lienholder.**—An after-acquired title vests immediately in a former grantee under a warranty deed, but such title will be held in subordination to a lien created by contract of the grantor to secure money used in acquiring such title under the statute of redemption. (Ala.) New England Mtg. Security Co. v. Fry, 62.

3. **DEED—Undue Influence of Nurse and Daughter.**—Where a daughter keeps house for her aged father, and during his sickness ministers to his wants as an affectionate and dutiful child, rather than as a nurse, no presumption arises that his deed to her is obtained by undue influence. (Mo.) Bonsal v. Randall, 528.

4. **DEEDS—Execution of by Illiterate Person—Signature.**—If a deed, executed by a person unable to write, has the name written thereon by another, and a cross-mark is placed between the Christian and surname, but the words "his" or "her" "mark" are omitted, and the deed is then properly acknowledged, it is valid. (Ala.) Loyd v. Oates, 39.

5. **DEEDS—Description—Exceptions.**—If a deed conveying a body of land in describing it contains the words "less eighty acres sold before," such exception does not affect the validity of the deed, nor is such exception void for uncertainty, as it may be made certain by parol evidence. (Ala.) Loyd v. Oates, 39.

6. **DEEDS—Repugnant Clauses.**—If an estate in fee is given to a grantee in both the premises and the habendum of the deed, and the warranty is in harmony with the preceding parts of the instrument, but following the warranty two entirely new clauses, both repugnant to the estate conveyed, are introduced, such clauses are void. (N. C.) Wilkins v. Norman, 767.

7. **DEEDS.—If There are Two Repugnant Clauses** in a deed, the first will control and the last be rejected. (N. C.) Wilkins v. Norman, 767.

8. **DEEDS—Rules of Construction—Intention of Grantor.**—Although courts in construing a deed seek for the intention of the grantor by an examination of the entire instrument, and effectuate his intention when found, nevertheless it is their duty, when rules of construction have been settled, to enforce them, otherwise titles are rendered uncertain and insecure. (N. C.) Wilkins v. Norman, 767.

See Acknowledgment; Gift; Insane Persons; Remainders, 6.

Note.

Definition of writs of prohibition, 930.

DEPOSITIONS.

DEPOSITIONS—Compliance with Statute.—If the statute requires that an officer taking depositions shall deliver them to the clerk of court in which the action is pending or send them by mail or private conveyance and if sent by private conveyance, the person by whom sent must make oath that they were not opened by him or anyone else in their transit, and the officer taking the depositions makes affidavit as to the individual agent of the express company to whom he delivered them, and such agent, together with all others of the express company into whose hands the depositions passed to the time they were delivered to the clerk of the court, make affidavit that the depositions had not been opened by them, or any person in transit, and the clerk of the court makes affidavit that the depositions reached him in a sealed envelope directed to him as clerk, this is a sufficient compliance with the requirements of the statute. (Ky.) Standard Oil Co. v. Doyle, 331.

DIVORCE.

1. **DIVORCE—Conclusiveness of Foreign Decree.**—A decree of a court in one state, in respect to which no fraud or want of jurisdiction is alleged, that a divorce granted in another state is valid, is binding in a third state, and precludes an attack there on the validity of the decree of divorce. (N. C.) Bidwell v. Bidwell, 797.

2. **DIVORCE—Foreign Decree—Estoppel as to Alimony.**—A defendant in a divorce action who accepts a money allowance awarded her, and who some six years later herself institutes an action for a divorce in another state, which is determined against her, and in which she is awarded another allowance, is estopped, after considerable further delay in apparent acquiescence, her husband having meanwhile contracted a second marriage, to assert a claim, in the courts of a third state, for further pecuniary allowance from him. (N. C.) Bidwell v. Bidwell, 797.

3. **JUDGMENT OF DIVORCE in Another State—Collateral Attack.**—A decree of divorce rendered in one state may be impeached collaterally in the courts of another state, by proof that the court granting the divorce had no jurisdiction, notwithstanding recitals in the decree to the contrary. (Ala.) Ingram v. Ingram, 31.

4. **JURISDICTION—Courts of Other States—Fraudulent Acknowledgment of Service.**—Acknowledgment of service of process in a suit for divorce, instituted in one state against a resident of another, is insufficient to confer jurisdiction when such acknowledgment was made in ignorance of its purport, and was procured by fraud and deception. (Ala.) Ingram v. Ingram, 31.

5. **DIVORCE, Effect of Death of a Party After.**—On the death of the plaintiff after judgment in divorce, there cannot be any substituting of his executors to represent him, nor any proceedings against them, for the purpose of vacating the decree. (Wash.) Dwyer v. Nolan, 919.

6. **DIVORCE, Vacating Decree or After the Death of a Party.**—After the death of a plaintiff in whose favor a decree of divorce has been entered, the court cannot make any order vacating the decree on the ground of want of jurisdiction over the defendant when it was entered, for the reason that there is no one on whom service of the notice to vacate can be made. (Wash.) Dwyer v. Nolan, 919.

See Contracts, 2; Public Lands, 1.

DOWER.

SECRET MARRIAGE—Right to Dower.—If a marriage is kept secret, but without any fraudulent purpose, the wife is entitled to dower as against a mortgagee in a mortgage executed by the husband alone. (Mich.) Hall v. Marshall, 404.

Note.
Drugs, liability of manufacturer or seller of to third persons, 713.

EASEMENTS.

1. **EASEMENT by Parol.**—A parol grant of an easement may rest in implication. (Neb.) Znamanacek v. Jelinek, 533.

2. **EASEMENTS by Parol.**—A parol grant of an easement upon a valid consideration, certain in its terms, and with such performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds, will be upheld. (Neb.) Znamanacek v. Jelinek, 533.

See Vendor and Vendee, 3, 4.

EAVESDROPPING.

EAVESDROPPING—Essentials of Offense.—An Indictment for eavesdropping is defective, if it fails to charge that the conduct described is habitual, or facts from which such habit can be inferred, and also fails to allege that anything so heard has been repeated in the presence of divers persons. (N. C.) State v. Davis, 816.

EJECTMENT.

1. **EJECTMENT.—An Equitable Title will Sustain** an action in ejectment. (N. C.) Walker v. Miller, 805.

2. **EJECTMENT—Mineral Lands.—Ejectment** will lie to recover a mineral interest in lands. (Ala.) Moragne v. Doe, 52.

3. **EJECTMENT by Administrator.**—An administrator may maintain ejectment to recover possession of real estate of his intestate, without regard to whether, when recovered, it is intended for distribution or the payment of debts. (Ala.) Moragne v. Doe, 52.

ELECTION OF WIDOW.

See Wills, 5-7.

ELECTIONS.

1. **ELECTIONS—Voting Machines—Constitutional Law.**—A vote cast by the use of a voting machine is a vote "given by ballot," within the meaning of a constitutional provision that "all votes shall be given by ballot," and therefore a statute authorizing the use of voting machines is not in conflict with such constitutional provision. (Mich.) Detroit v. Board of Inspectors, 430.

2. **ELECTIONS, Voting by Ballot.—A Constitutional Provision** that all votes shall be given by ballot is a declaration of state policy, assuring to the voter a secret, as distinguished from an open or announced, vote. (Mich.) Detroit v. Board of Inspectors, 430.

3. **ELECTIONS—Voting by Ballot Defined.**—The word "ballot" means the ball or ticket used in voting, the act of voting, the result of voting; the "voting by ballot" is a term used to distinguish open,

viva voce, or public voting from secret voting. (Mich.) Detroit v. Board of Inspectors, 430.

ELECTRICITY.

1. **ELECTRICITY—Negligence in Managing.**—Where a live electric wire has broken and fallen to the ground, it is evidence of negligence to wind it up in a coil and hang it up on an electric light pole some five or six feet above the ground, in a portion of the city frequented by many persons, and there leave it for two days. (N. C.) Fisher v. New Bern, 857.

2. **ELECTRICITY—Care Required in Managing.**—Persons controlling so dangerous and subtle an agency as electricity must not be permitted to theorize in regard to its probable effects, or speculate upon the chances of results affecting human life; their wires must either be insulated or placed beyond the danger line of contact with people using the public streets. (N. C.) Fisher v. New Bern, 857.

3. **ELECTRIC WIRES—Injury to Trespasser.**—If a guy wire used by a telephone company breaks and falls across an electric light wire below belonging to another company, and the broken end drops to the ground in an open field across which people are accustomed to travel without objection from the land owner, the telephone company is not exempt from liability for the death of a person who there comes in contact with the wire, on the ground that, as against the owner of the land, the deceased was a trespasser or bare licensee. (N. J. L.) Guinn v. Delaware etc. Tel. Co., 668.

4. **ELECTRIC WIRES—Duty to Place Guards Between.**—In an action against a telephone company for the death of a person caused by contact with one of its guy wires which had broken and fallen across an electric light wire below belonging to another company, and thereby had become charged with a deadly current of electricity, it is permissible for the jury to infer that the omission of a guard between the two wires was an act of negligence. (N. J. L.) Guinn v. Delaware etc. Tel, Co., 668.

5. **ELECTRIC WIRES—Duty as to Parallel or Intersecting Wires.** Where the danger of the guy wire of a telephone company breaking and falling across an electric light wire belonging to another company arises after the construction of the telephone line, and is due to the running of the electric light wire below the guy wire, the care required of the telephone company changes with the changed circumstances. (N. J. L.) Guinn v. Delaware etc. Tel. Co., 668.

See Municipal Corporations, 16.

Note.

Elevators, manufacturers of, liability of to third persons injured by, 715.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—Public Use—Logging Road.**—A statute authorizing owners of timber lands to condemn a right of way for tramways or railways for their exclusive use is unconstitutional. (N. C.) Cozard v. Kanawha Hardwood Co., 779.

2. **EMINENT DOMAIN.—Whether a Use is Public** is for the ultimate decision of the courts. (N. C.) Cozard v. Kanawha Hardwood Co., 779.

3. **EMINENT DOMAIN.—If a Use is Public, the Expediency or Necessity** for establishing it is exclusively for the legislature. (N. C.) Cozard v. Kanawha Hardwood Co., 779.

EQUITY.

1. **EQUITABLE JURISDICTION—Dismissal of Bill.**—If it is apparent to the appellate court upon the face of a bill in equity that it does not state a case cognizable in a court of equity, the court will dismiss such bill for want of equity, even though the question of equitable jurisdiction is not presented by the pleadings or raised before the appellate court. (Fla.) Florida Packing etc. Co. v. Carney, 95.

2. **EQUITY PRACTICE—Error in Admitting Incompetent Evidence.**—It is an incorrect statement of the law to say that it is not error to admit incompetent evidence in an equity case, or that the finding of the trial court will never be reversed for such error. (Mo.) Russell v. Sharp, 496.

3. **EQUITY JURISDICTION—Parties.**—Courts of equity will refuse relief when the rights of the parties who cannot be subjected to the jurisdiction of the courts are so bound up in the subject matter of the suit and relief sought that a decree would afford no protection to some of the parties in court, and would not bar a future suit against them touching the same subject matter by the absent parties. (N. H.) Moore v. Maryland Casualty Co., 647.

See Fraudulent Conveyances, 3; Parties, 3.

ESTATES.

ESTATES, Vesting of is Favored.—The law favors the early vesting of estates, and in doubtful cases the interest should be deemed vested in the first instance rather than contingent, unless the instrument under consideration does not admit of such construction. (Md.) Roberts v. Roberts, 344.

See Life Estates; Remainders.

ESTATES OF DECEDENTS.

See Abatement and Revival; Executors and Administrators.

ESTOPPEL.

ESTOPPEL.—Whoever Conceals Facts Required by Good Faith and Fair Dealing to be disclosed acts inequitably, and will not be permitted to assert these facts to the injury of one misled by such conduct. (N. Y.) Chemical Nat. Bank v. Kellogg, 717.

EVIDENCE.

In General.

1. **EVIDENCE—Judicial Notice.—The Regulations of the Post-office Department** are part of the public records of which courts take judicial notice. (Ind. App.) Carr v. First National Bank, 159.

2. **EVIDENCE—Facial Expressions of Accused.**—Witnesses are competent to testify that the accused at a certain time appeared angry, surprised, or otherwise. (Ala.) Tagert v. State, 17.

3. **EVIDENCE—Contents of Lost Letters.**—A witness is incompetent to state the contents of a lost letter which has been in his possession, on his mere statement that it has been lost, misplaced, or destroyed, but that it was not among certain letters destroyed by him, and that no search has been made for it among those not thus destroyed. (Ala.) Tagert v. State, 17.

4. **EVIDENCE.—The Value of Admissions as Evidence** depends upon the circumstances under which and to whom and when they are made; sometimes they are of a high order of evidence, but at other times they are of little weight. Conversations had many years ago, of a casual character, in which the witness has no interest, and which he has no reason to remember, are of a low grade of evidence, especially if held with a person now deceased. (Mo.) Russell v. Sharp, 496.

5. **EVIDENCE, When not Inadmissible as Stating a Conclusion.**—The witness' reply to a question why he did not get up in a car, that it was so crowded that it was impossible for him to do so before he was hurt, is not inadmissible on the ground that it merely states a conclusion. (Ind. App.) Indianapolis Street Ry. Co. v. Haverstick, 163.

6. **EVIDENCE Offered in Support** of an element of damage alleged, and allowed over general objection, is not error if it is legally pertiment or relevant in any aspect of the case. (Fla.) Western Union Tel. Co. v. Wells, 129.

Of Age of Person.

7. **EVIDENCE of Age of Person.**—The wife of a deceased husband with whom she had lived for twenty years, and to whom she had talked regarding his birthdays at different times, and who has a general acquaintance with the family history and traditions concerning his birth, age, and pedigree, is competent to testify to his age. (Neb.) Grand Lodge A. O. U. W. v. Bartes, 577.

8. **EVIDENCE of Age of Person—Presumption.**—A wife who has lived for twenty years with her husband is presumed to know his age and to be qualified to testify thereto. (Neb.) Grand Lodge A. O. U. W. v. Bartes, 577.

9. **EVIDENCE of Age of Person.**—The date of a person's birth may be testified to by members of his family, although they may know of the fact only by hearsay founded on family tradition. (Neb.) Grand Lodge A. O. U. W. v. Bartes, 577.

10. **EVIDENCE of Age of Person—Qualifications of Witness.**—The fact that the first knowledge obtained by a wife as to her husband's age is derived from an incompetent source, goes only to her credibility, and does not disqualify her from testifying to his age where, by reason of her membership in his family, her knowledge of his age is gained from other valid sources. (Neb.) Grand Lodge A. O. U. W. v. Bartes, 577.

See Rape.

EXECUTIONS.

See Municipal Corporations, 17.

Note.

Execution, injunction against sale under of exempt personal property, 101.
injunction against sale under of family relics, 98.
injunction against sale under of mortgaged chattels, 99.
injunction against sale under of paintings, 98.
injunction against sale under of personal property, general rule, 97.
injunction against sale under of personal property levied upon under another execution, 100.
injunction against sale under of personal property of partnership, 100.

Execution, injunction against sale under of property claimed by third persons, 99.
injunction against sale under of property in custodia legis, 99.
injunction against sale under of slaves, 98.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS—Disqualification Because of Infamous Crime.—Under a statute providing that if the person named as executor in a will has been guilty of a crime rendering him infamous according to law, administration may be granted as if he had not been named, a person is not disqualified because he collected and retained more than ten dollars for his services in procuring a pension. (Md.) Gantee v. Bond, 385.

2. EXECUTORS AND ADMINISTRATORS—Administrators de Bonis Non.—After an estate has been adjudged finally settled, and the administrator thereof discharged by order of court, letters of administration de bonis non cannot be issued upon the same estate while such final settlement remains unrevoked and in force, the matter being res judicata. (Ala.) Hicky v. Stallworth, 57.

3. EXECUTORS AND ADMINISTRATORS—Administrators de Bonis Non.—The appointment of an administrator de bonis non, when there is no vacancy, is absolutely void, and will be so declared, even in a collateral proceeding. (Ala.) Hicky v. Stallworth, 57.

See Abatement and Revival, 2; Ejectment, 3.

EXPLOSIVES.

EXPLOSIVES, Care to be Exercised With.—The degree of care required of persons having the possession and control of dangerous explosives, such as dynamite, is of the highest. The utmost caution must be used to the end that harm may not come to others in coming in contact with them. (Minn.) Mattson v. Minnesota etc. R. R. Co., 483.

Note.

Explosives, manufacturers of, liability to third persons injured by, 716.

FALSE IMPRISONMENT.

1. IMPRISONMENT—What is.—Every deprivation of liberty of another without his consent, whether by violence, threats or otherwise, constitutes imprisonment within the meaning of the law. (Md.) Bernheimer Bros. v. Becker, 356.

2. ARREST, Authority of an Agent to Make or Authorize.—An agent or an employé of an ordinary business has no implied authority to make an arrest. This principle extends to the manager of a department of a department store. (Md.) Bernheimer Bros. v. Becker, 356.

3. DAMAGES, Exemplary.—An instruction in an action to recover for a wrongful arrest to the effect that if the jury finds for the plaintiff, they may award exemplary damages, is too broad, if, in connection with other instructions, it does not require the jury to find, as a condition of awarding such damages, that the alleged wrong to the plaintiff had been inflicted maliciously, wantonly and with circumstances of contumely and indignity. (Md.) Bernheimer Bros. v. Becker, 356.

See Partnership, 6.

Note.
Food, caterers, public, liability of to third persons for effect of unwholesome, 715.
implied warranty in the sale of, 715.
liability of manufacturer or seller of to third persons, 713.
sold to be resold, liability for defects in, 715.

FORMER JEOPARDY.

See Criminal Law, 6, 7.

FRAUD.

1. **FRAUD OR DECEIT, with Damage, is a Good Cause of Action.** (N. Y.) Kuelling v. Lean Mfg. Co., 691.

2. **FRAUD OR DECEIT, Right of Third Person to Recover for.**—The right to recover for fraud or deceit is not restricted to the parties to the transaction, but extends to third persons injured thereby. (N. Y.) Kuelling v. Lean Mfg. Co., 691.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS—Contract to Assume Debt of Another.** The statute of frauds does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor, the promisor thus becoming sole debtor in his place and stead. (N. C.) Jenkins v. Holley, 846.

2. **STATUTE OF FRAUDS—Flexibility—Prevention of Fraud.**—Courts of equity require a party to observe and perform his contract, though it is within the scope of the statute of frauds and is not in writing, if it has in good faith been fully performed by one party, and if refusal to perform it by the other will result in great injustice and the perpetration of fraud; but when a court of equity exercises this authority, it by no means brushes aside the statute or impugns its wisdom; on the contrary, it is so careful to see that the fraud which the statute was designed to guard against is not perpetrated that it adds to the statute a new strength by demonstrating that it may be so administered that justice will not suffer or the statute be made the instrument of the very evil it was designed to prevent. (Mo.) Russell v. Sharp, 496.

3. **STATUTE OF FRAUDS—Proof of Oral Contract.**—When one invokes the aid of equity to enforce, in the face of the statute of frauds, an oral contract, on the ground that it has been performed by him and that its nonperformance by the other party will result in injustice and fraud, the court requires him to prove his case, not by vague or shadowy evidence, not even by a preponderance of evidence, but by evidence so unquestionable in its character, so clear, cogent and convincing, that no reasonable doubt can be entertained of its truth, that no such doubt can linger either as to the existence of the contract or the certainty of its terms, or that the plaintiff has wholly performed his part. (Mo.) Russell v. Sharp, 496.

4. **STATUTE OF FRAUDS—Oral Contract to Make Will.**—Where the aid of a court of equity is invoked to enforce an oral contract whereby the owner of land agrees with his niece and her husband that, if they will move on his farm and take care of him when sick, they shall have his property upon his death, they claiming that they have fully performed their part of the agreement, the contract and its performance must be established by clear and convincing evi-

dence. It is a significant circumstance, in such a case, that the children of the alleged devisees, though the contract is alleged to have been in existence thirty years, never heard of it, and that the devisees, at least on one occasion, abandoned the farm to seek a home elsewhere. (Mo.) Russell v. Sharp, 496.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—Parent and Child.—A conveyance of land from a son to his parents for the honest purpose of satisfying an indebtedness to them, is valid and not in fraud of his other creditors. (Iowa) First National Bank v. Brubaker, 209.

2. FRAUDULENT CONVEYANCES—Partnership Property—Insolvency.—A conveyance of partnership property in satisfaction of the debt of an individual partner, if made in good faith, is valid against other firm creditors, even though the firm or the individual partner was insolvent at the time of the conveyance. (Iowa) First National Bank v. Brubaker, 209.

3. JURISDICTION of Lands in Another State.—The courts of one state have no jurisdiction to set aside a fraudulent conveyance of land situate in another, though made by a corporation in the former state. (Ala.) West Point Mining etc. Co. v. Allen, 60.

GAMBLING.

GAMBLING—Place.—One who receives money in one state and transmits it by telegraph to another state, to be there bet on horseraces as directed, does not conduct a gambling or illegal business in the former state. (N. H.) McQuesten v. Steinmetz, 592.

GARBAGE TAX.

See Municipal Corporations, 14.

GARNISHMENT.

VENUE, Change of in Garnishment Proceedings.—Statutes authorizing a change of venue where an impartial trial cannot otherwise be had or where convenience and justice will be forwarded by the change apply to garnishment proceedings. (Wash.) State v. Superior Court, 915.

GAS.

NATURAL GAS—Right to Use and Waste.—Every owner of land may bore for gas on his own ground, and make any reasonable use of it, but he may not deliberately waste the supply for the purpose of injuring his neighbor, or wantonly destroy or injure their common reservoir. (Ky.) Louisville Gas Co. v. Kentucky Heating Co., 225.

GIFTS.

1. GIFTS—Power to Make—Improvidence—Revocation.—The law permits anyone to dispose of his property gratuitously, if he pleases, provided the rights of creditors are not injuriously affected thereby. He may, if he sees fit, reserve to himself the right to revoke his gift; or, if he desires, he may make the gift absolute and irrevocable, and his power in this regard does not depend upon the providence or the improvidence of his act. (N. J. Eq.) James v. Aller, 654.

2. **GIFT BY PARENT TO CHILD—Improvidence—Revocability.** If a father, in the prime of life, in the full possession of his faculties, with a full understanding of the effect of his act, and without the exercise of any influence over him by his children, he occupying the dominant position in relation to them, makes an absolute gift to them, the gift, although improvident, is irrevocable. (N. J. Eq.) James v. Aller, 654.

3. **DEED OF GIFT TO PARENT.—Avoidance by Donor.**—A deed of gift, executed by a young woman a few months after reaching her majority, to her stepmother, of whose family she had been a member since infancy, may be set aside on the application of the donor, if at the time of its execution there existed between the parties thereto a relation of trust and confidence in which the donee occupied the dominant position, and the donor, when making the deed, did not have competent and independent advice as to its effect. (N. J. Eq.) Albert v. Haeberly, 652.

GUARANTY.

1. **GUARANTY—What is not.**—A letter, written in reply to an inquiry as to the general standing of a third person, which reads: "We regard him as a perfectly reliable, trustworthy gentleman, with whom your samples and sales would be entirely safe, and doubly so as all tobacco of yours that might be shipped would come direct to our warehouse, and the payment of all such tobacco would be made by us to you for all sales," does not constitute a guaranty. (N. C.) Hughes v. Peper Tobacco etc. Co., 778.

2. **GUARANTY is a Contract Separate** and apart from the note itself, and the guarantor and maker of the note cannot be joined in one action, while the maker and indorser may. (Neb.) Lemmert v. Guthrie Bros., 561.

3. **GUARANTY—Notice of Default.**—If a note is given with guaranty and the makers are solvent at the time of the maturity of the note, but insolvent at the time of notice to the guarantor, he being entitled to notice, he is damaged in the amount due upon the note by reason of the failure to give him notice of the default of the maker. (Neb.) Lemmert v. Guthrie Brothers, 561.

4. **GUARANTY—Notice of Default—Damage to Guarantor.**—The failure of the holder of a negotiable note to notify the guarantor of the default of the maker within a reasonable time after default does not absolutely discharge the guarantor, but only to the extent that he is damaged by the delay. (Neb.) Lemmert v. Guthrie Bros., 561.

5. **GUARANTY—Failure to Give Notice of Default.**—If, at the time that the makers of a note are solvent, guarantors sign the following guaranty upon the back of the note, "For value received, we hereby guarantee payment of the within note and waive demand and protest on the same when due," and the note is not paid at maturity when the makers are solvent, nor demand made upon the guarantors until long after, and when the makers are insolvent, the guarantors, by their indorsement, do not waive notice of the nonpayment of the note at maturity, and from want of such notice are discharged from liability. (Neb.) Lemmert v. Guthrie Bros., 561.

GUARDIAN AND WARD.

1. **GUARDIAN AND WARD—Settlement of Estate.**—The guardian of a minor heir may agree to a division and distribution of the ancestor's estate in kind without an order from the probate court, when it appears to him that such method will be for the best interests

of his ward, and if such action is challenged, it is sufficient for him to show that he acted in good faith and with reasonable care and prudence. (N. H.) Stevens v. Meserve, 612.

2. **GUARDIAN AND WARD—Settlement of Ancestor's Estate.**—A guardian of a minor heir is, upon a division of the ancestor's estate in kind, entitled to accept notes and securities other than those in which he would be required to invest funds coming into his hands, when the interest of his ward seems reasonably to so demand. (N. H.) Stevens v. Meserve, 612.

3. **GUARDIAN AND WARD—Evidence of Care Exercised by Guardian.**—Evidence that stock and notes were taken by a guardian as part of his ward's inheritance under the advice of counsel, that the original holder regarded them as safe, and that trustees, bank officials, and other investors were accustomed to invest in similar securities, is competent upon the question of the care, prudence and fidelity of such guardian. (N. H.) Stevens v. Meserve, 612.

4. **GUARDIAN AND WARD—Care Required of Guardian.**—A guardian is required to exercise only reasonable diligence, care and prudence in looking after and managing the property of his ward. (N. H.) Stevens v. Meserve, 612.

5. **GUARDIAN AND WARD—Care Required of Guardian in Investing.**—In making investments of his ward's estate in mortgage securities, a guardian is only required to satisfy himself by an investigation, conducted in good faith and with reasonable prudence, that the value of the mortgaged property is at least double the amount of the loan secured thereby. If he exercises such care he will be protected accordingly, even though he err in judgment. (N. H.) Stevens v. Meserve, 612.

6. **GUARDIAN AND WARD—Care Required of Guardian in Investing.**—A guardian accepting mortgage notes in settlement of a desperate claim in favor of his ward with knowledge that the value of the security was less than double the value of the claim cannot be charged with a loss resulting from the transaction, if, after a full investigation, conducted in good faith and reasonable prudence, the guardian is satisfied that such settlement is for the best interests of his ward. (N. H.) Stevens v. Meserve, 612.

See Limitation of Actions, 2.

HABEAS CORPUS.

HABEAS CORPUS—Judgment of Conviction, When Conclusive of the Jurisdiction.—A judgment convicting the defendant of larceny in a county designated in the indictment cannot be collaterally attacked on habeas corpus by proof that the crime was committed on a United States military reservation within the same county of which the convicting court had not jurisdiction. (Wash.) In re Russell, 910.

HOMESTEADS.

1. **HOMESTEAD in Life Estate of Husband.**—A wife is entitled to claim a homestead in a life estate held by her husband. (Neb.) Downing v. Hartshorn, 550.

2. **SECRET MARRIAGE—Right of Woman to Homestead.**—Where a secretly married woman has not lived on premises prior to the execution thereon of a mortgage by her husband, she is not entitled to a homestead as against the mortgagee, who was ignorant of her marriage. (Mich.) Hall v. Marshall, 404.

3. **HOMESTEADS.—An Execution Sale of a Homestead** in defiance of a claim for exemption and in the absence of the appraisement required by law is void. (Wash.) Waldron v. Kineth, 1022.

4. **HOMESTEAD—Execution Sale, Refusal to Confirm.**—If an execution sale has been made of real property, the question of whether it was a homestead and sold without appraisement or other compliance with the law respecting the forced sale of homesteads may be presented in opposition to the confirmation of the sale, and confirmation thereof may be refused. (Wash.) Waldron v. Kineth, 1022.

See Public Lands.

HOMICIDE.

HOMICIDE in the Commission of an Unlawful Act.—If a person, while hunting on premises without the written permission of the owner, which, by a local statute, is made a misdemeanor punishable by fine, accidentally kills his companion, the homicide is excusable. (N. C.) State v. Horton, 818.

HOUSE-BREAKING.

HOUSE-BREAKING by Removal of Window Strip.—To remove an outside window strip, thus leaving the window unprotected so that it may easily be lifted out, in order to enter a warehouse to steal, does not constitute a breaking of the building, if additional force is necessary to remove the window and make entry possible. (Ky.) Gaddie v. Commonwealth, 259.

HUSBAND AND WIFE.

See Acknowledgment; Life Estates; Marriage.

IDEM SONANS.

See Names.

INCEST.

1. **INCEST With Daughter of Deceased Wife.**—Under a statute defining incest as the intermarriage of, or sexual intercourse between, persons within the degrees of consanguinity or relationship within which marriages are declared by law to be incestuous and void, with knowledge of such consanguinity or relationship, and another statute declaring that no man shall marry the daughter of his wife, sexual intercourse between a man and the daughter of his deceased wife, while there is living issue of the marriage, constitutes the crime of incest. (Ala.) Tagert v. State, 17.

2. **RELATIONSHIP by Affinity.**—After the death of a wife, living issue of the marriage continues the affinity between her husband and her blood relations. (Ala.) Tagert v. State, 17.

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INDEPENDENT CONTRACTORS.

See Master and Servant, 5-7.

INFAMOUS CRIMES.

See Criminal Law, 1-3.

INJUNCTIONS.

1. **INJUNCTION, Complaint, When Sufficient for, Though the Amount of Damages is not Stated.**—Though the complaint does not state that the complainant has suffered damages in any specific amount, it will sustain an injunction against the continuance of an alleged nuisance, if it shows that such continuance will work serious and irreparable injury to the plaintiff's business, as that, being the keeper of a hotel, the acts complained of, consisting of the operation of a shooting-gallery and certain musical instruments, have driven away several of his patrons, and, if continued, will drive away the remainder. (Wash.) Grantham v. Gibson, 1003.

2. **INJUNCTION, When Will not be Set Aside Because Too Sweeping.**—An order directing the issuing of a temporary injunction will not be reversed as too sweeping, if that question was not presented in the trial court, and the only claim made there was that an injunction should not issue at all. (Wash.) Grantham v. Gibson, 1003.

3. **INJUNCTION Against Ordinance—Parties.**—If an invalid city ordinance affects a large number of people, such as the congregation of a church, one of the members may prosecute a suit to enjoin its enforcement. (Ky.) Boyd v. Board of Council, 240.

4. **INJUNCTION—Cancellation of Instruments.**—The prosecution of a suit in ejectment will not be enjoined, nor the deed under which the plaintiff in ejectment claims canceled, on the ground that such deed and the record thereof have been fraudulently altered. (Ala.) Wilson v. Miller, 42.

5. **INJUNCTION Against Execution Sale of Personalty.**—A court of equity will not enjoin a levy upon and sale of personal property unless it is of such peculiar value and intrinsic worth to its owner that its loss cannot be compensated adequately in damages. (Fla.) Florida Packing etc. Co. v. Carney, 95.

6. **INJUNCTION Against Interference by the Police with an Alleged Disorderly House.**—Equity will not intervene to restrain the police authorities from stationing officers outside a place having a liquor tax certificate, when such authorities suspect that the place is being conducted as a disorderly house; and from informing customers who are in the place and those who are about to enter that it is a disorderly house which is likely to be raided at any moment, and that those on the premises at the time of such raiding are liable to arrest. (N. Y.) Delaney v. Flood, 759.

7. **STRIKE INJUNCTION—Criminal Acts.**—An injunction against strikers to prevent them from destroying the plaintiff's business and intimidating his employés, will not be refused on the ground that the acts complained of are of a criminal nature, and that to punish them as contempts amounts to an assumption of criminal jurisdiction without the intervention of a jury. (Ky.) Underhill v. Murphy, 262.

8. **INJUNCTION—Adequate Remedy at Law.**—The rule that an injunction will not be granted where there is an adequate remedy at law refers to legal remedies, and not to criminal proceedings. (Ky.) Underhill v. Murphy, 262.

9. **STRIKE INJUNCTION—Criminal Acts—Legal Remedy.**—An injunction against strikers to prevent them from destroying the plaintiff's business and intimidating his employés, will not be refused on the ground that the law furnishes an adequate legal remedy by having the defendants give security to keep the peace. (Ky.) Underhill v. Murphy, 262.

Note.
Injunction against sales of personal property under execution, 97-102.

INSANE PERSONS.

1. **INSANE PERSON'S Liability for Slander.**—If it appears that at the time of speaking defamatory words the speaker was either totally deranged, or was laboring under an insane delusion on the subject to which the words relate, insanity is a good defense in an action for slander. (Ky.) Irvine v. Gibson, 251.

2. **INSANE PERSONS.—The Contracts of Idiots, Lunatics,** and other persons non compos mentis are generally regarded, in a certain sense, as invalid. (N. C.) Sprinkle v. Wellborn, 827.

3. **INSANE PERSONS.—Contracts Entered into by a Person** apparently sane, before the fact of insanity has been judicially established, are at most voidable, and will not be set aside if the other party had no notice of the insanity, has derived no inequitable advantage, and the parties cannot be placed in statu quo. (N. C.) Sprinkle v. Wellborn, 827.

4. **INSANE PERSONS—Presumption of Fraud.**—When a contract is entered into with an insane person, the law presumes fraud from the condition of the parties. The presumption is raised, without the aid of any evidence of actual imposition, from the very nature of the transaction, and is stronger or weaker according to the position or condition of the parties with respect to each other. (N. C.) Sprinkle v. Wellborn, 827.

5. **INSANE PERSONS—Cancellation of Deed.**—A court of equity has power to grant relief to an insane grantor, if no real injustice is thereby done to the grantee, and no superior equity has intervened in favor of a third person, but the grantor is not entitled to a rescission and cancellation of his deed as a matter of right. (N. C.) Sprinkle v. Wellborn, 827.

6. **INSANE PERSON.—A Purchaser for Value** and without notice from the grantee of an insane person takes a good title. But the insane person is not without a remedy, for he may proceed against his own immediate grantee, who had notice, for a personal judgment, and hold him responsible for the consideration paid him, which stands for the land. (N. C.) Sprinkle v. Wellborn, 827.

7. **INSANE PERSONS.—A Person has Mental Capacity** sufficient to contract if he knows what he is about. The measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not the ability to act wisely or discreetly, nor to drive a good bargain. (N. C.) Sprinkle v. Wellborn, 827.

INSTRUCTIONS.

See Trial, 9-12.

INSURANCE.

In General.

1. **INSURANCE—Recovery of Attorney Fees.**—A statute authorizing the recovery of attorney fees in certain cases against insurance companies in actions upon their policies is valid and constitutional. (Fla.) L'Engle v. Scottish Union etc. Co., 70.

2. **LIFE INSURANCE—Nonpayment of Premiums—Paid-up Policy—Minors.**—A provision in a policy of life insurance to the effect that a failure by the insured for three months after default in the payment of premiums to surrender the policy, and request to have his interest applied to the purchase of a paid-up policy payable at the time the original policy would have been payable if continued in force, amounts to an election to have such interest applied to the purchase of term insurance for the full amount named in the policy and is not affected by the fact that the assignees of the policy are minors. (Ky.) Mutual Benefit Life Ins. Co. v. Harvey, 269.

3. **INSURANCE—Knowledge of Conditions—Presumption.**—One who applies for and accepts an insurance policy is presumed, in the absence of fraud or imposition, to have had notice of, understood, and agreed to, and to be bound by, the terms, limitations and conditions contained therein. (N. H.) Johnson v. Maryland Casualty Co., 609.

4. **INSURANCE—Conditions.**—Parties to an insurance contract have a right to incorporate therein such conditions as appear to them to be proper. (N. H.) Johnson v. Maryland Casualty Co., 609.

5. **INSURANCE—Conditions as to Payment of Loss.**—Insurers have a right to designate in their contracts of insurance the terms upon which they will be responsible for losses, and they are liable only upon the conditions expressed in the policies. (N. H.) Johnson v. Maryland Casualty Co., 609.

6. **INSURANCE, ACCIDENT—Conditions—Notice of Injury.**—If an accident insurance policy provides that no recovery can be had thereunder unless notice of the claim be given within ten days of the injury, the insured who fails to comply with such provision cannot recover, when his only excuse for noncompliance is his ignorance

of the existence of the policy. (N. H.) Johnson v. Maryland Casualty Co., 609.

Construction of Policy.

7. **INSURANCE—Construction of Contract.**—In construing insurance policies courts are governed by the general rules applicable to other written contracts, and it is the duty of the court to adopt that construction which best corresponds with the intention of the parties. (N. H.) Johnson v. Maryland Casualty Co., 609.

8. **INSURANCE—Construction of Policy.**—The different provisions of a contract of insurance must be so construed, if it can be reasonably done, as to give effect to each; and where two interpretations equally fair may be given, that which gives the greater indemnity will prevail. If one interpretation, looking at the other provisions of the contract and to its general object and scope, would lead to an absurd conclusion, such interpretation must be abandoned and that adopted which will be more consistent with reason and probability, and, in all cases, the policy must be liberally construed in favor of the insured, so as not to defeat, without plain necessity, his claim to the indemnity, which, in making the insurance it was his object to secure. When the words, without violence, are susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss must in preference be adopted. (Fla.) L'Engle v. Scottish Union etc. Ins. Co., 70.

9. **INSURANCE—Construction in Favor of Insured.**—In construing insurance policies, all doubts are resolved in favor of the insured. If a policy is reasonably susceptible of two constructions, that one will be adopted which is most favorable to him. (N. C.) Jones v. Casualty Co., 843.

10. **INSURANCE—Blood Poisoning—Repugnant Clauses.**—If the main part of an insurance policy contains a definite indemnity against disability arising from blood poisoning, subsequent provisos entirely withdrawing blood poisoning from the operation of the policy are repugnant to the body of the contract and unenforceable. (N. C.) Jones v. Casualty Co., 843.

Employers' Liability Policy.

11. **INDEMNITY CONTRACTS—Parties.**—If a judgment for personal injury is not collectible because of the insolvency of the judgment debtor, the judgment plaintiff cannot maintain a bill in equity against a casualty or insurance company to compel payment to him of money due upon an employer's liability policy held by the judgment debtor, unless the latter or its receiver is made a party to the action, and jurisdiction of him obtained so that he may be concluded by the decree rendered in the latter proceeding. (N. H.) Moore v. Maryland Casualty Co., 647.

Fire Insurance.

12. **INSURANCE, FIRE—Interest of Insured.**—A provision in a policy of fire insurance stipulating that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the interest of the insured was other than unconditional and sole ownership is material, valid and binding upon the parties to the contract. (Fla.) Insurance Co. of North America v. Erickson, 121.

13. **INSURANCE, FIRE—Interest of Insured—Bond for Title.**—If an insured, prior to taking out a policy of fire insurance on property, executes to a third person a bond for title or contract for the sale

and conveyance of the property, whereby he unqualifiedly obligates himself, his heirs, etc., to convey such property in fee to such third person by good and sufficient deed, free of all encumbrances, upon the payment by such vendee of definitely fixed sums of money at certain fixed times, and whereby such third person, vendee, unqualifiedly binds himself, his heirs, etc., to pay the sums agreed upon at the dates specified, such bond or contract renders the vendor no longer the sole and unconditional owner of the property, but converts him into a trustee holding the legal title in trust for the vendee as security for the payment of the agreed purchase price, and, unless such status toward the property is provided for by agreement between the insurer and the insured, duly indorsed on the policy or added thereto, such policy is null and void when it contains a provision that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the interest of the insured be other than unconditional or sole ownership. (Fla.) Insurance Co. of North America v. Erickson, 121.

14. **INSURANCE, FIRE—Unconditional Ownership.**—The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership, within the true meaning of the ordinary clause upon that subject in fire insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs. (Fla.) Insurance Co. of North America v. Erickson, 121.

Concurrent Insurance.

15. **INSURANCE—Concurrent Insurance.**—If a policy of insurance on buildings contains a clause providing that it shall become void if the insured then has, or shall thereafter make or procure, any other contract of insurance, unless otherwise provided by agreement indorsed on, or added to, the policy, and it has attached to it an indorsement slip, of the same date, containing a description of the property insured, the amount of insurance written thereon, and a clause reciting that "two thousand five hundred dollars total insurance permitted," such sum being the amount of insurance written in the original policy, such indorsement slip and clause construed in connection with the whole policy permit other concurrent insurance in the sum named therein. (Fla.) L'Engle v. Scottish Union etc. Ins. Co., 70.

Mutual Companies.

16. **INSURANCE.—When Members of a Mutual Fire Insurance Association** have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion thereof. (N. C.) Perry v. Farmers' Mutual Fire Ins. Assn., 791.

17. **INSURANCE.—A Member of a Mutual Fire Insurance** company, whose losses are payable from assessments upon the other members, cannot hold the officers of the company personally liable for his loss, because they have diverted funds upon which he had no claim for his loss. His remedy is to have an assessment made to pay his loss. (N. C.) Perry v. Farmers' Mut. Fire Ins. Co., 791.

18. **INSURANCE.—A Member of a Mutual Fire Insurance** company cannot hold the officers thereof personally liable for the amount of his loss, on the ground that they procured the dissolution and reorganization into a new company of the branch association which

was liable for the loss. (N. C.) Perry v. Farmers' Mut. Fire Ins. Co., 791.

INTOXICATING LIQUORS.

1. POLICE POWER—Intoxicating Liquors.—The regulation of the sale of intoxicating liquor is within the police power of the state. (Ala.) Equitable Loan etc. Co. v. Edwardsville, 34.

2. MUNICIPAL CORPORATIONS—Police Powers—Dispensary.—The legislature in dealing with the sale of intoxicating liquors is fulfilling a public duty and striving to promote the health, safety and morals of the community; and, in granting to a municipality the right to establish a dispensary for dispensing intoxicating liquors, it authorizes a public use, object and purpose in the promotion of which public money may be lawfully invested and expended. (Ala.) Equitable Loan etc. Co. v. Edwardsville, 34.

3. MUNICIPAL CORPORATIONS—Intoxicating Liquors—Property Subject to Execution.—If the legislature has conferred upon a municipality charter power to establish and carry on a dispensary for the sale of intoxicating liquor, the municipality in conducting such dispensary exercises a governmental function and the stock of liquors in such dispensary is not subject to levy and sale under execution on a judgment against the city, even though such dispensary is run at a profit. (Ala.) Equitable Loan etc. Co. v. Edwardsville, 34.

IRRIGATION COMPANY.

See Mandamus, 2.

JOINT TORT-FEASORS.

See Contribution; Release.

JUDICIAL SALES.

See Contracts, 1.

JUDGMENTS.

1. JUDGMENT by Default, When Will not be Opened Because of Want of Diligence.—If one sued in a county not that of his residence retains an attorney to defend the action, and the latter in turn employs a local attorney, to whom the answer is sent by registered mail, to be filed, and the latter, owing to his absence from home, does not receive such mail for eleven days, during which time judgment by default is entered against the client, such judgment will not be set aside on the ground of inadvertence, mistake or excusable neglect, when it appears that the attorney thus forwarding the answer must have known that it had not been received, because he had not been presented with any receipt by the postoffice authorities showing the delivery of the registered letter. (Ind. App.) Carr v. First National Bank, 159.

2. COLLATERAL ATTACK upon Judicial Proceedings.—When judicial proceedings are collaterally attacked, all intendments are in favor of their regularity. This rule applies in favor of an order vacating a previous order. (Wash.) Sullivan's Estate, In re, 895.

See Appearance; Courts.

JURY.

1. **CONSTITUTIONAL LAW—Jury Trial in Partition.**—If a statute investing a court of equity with power to try legal titles in actions for partition without the aid of a jury is in effect at the time a constitution is adopted, the provisions in the latter in relation to jury trials does not take away the power conferred by the statute. (Fla.) Camp Phosphate Co. v. Anderson, 77.

2. **JURY TRIAL—Separation of Jury and Drinking of Whisky.**—If, on the trial of a criminal prosecution, the jury is ordered to be kept together in charge of the bailiffs, and one of the jurors in company with a bailiff separates from the others and goes to a public saloon without permission from the court or the consent of the accused, and takes a drink of whisky, and immediately, in charge of such bailiff, returns to the other jurors, this is such misconduct on the part of the juror as entitles the accused, if convicted, to a new trial, though no conversation took place in addition to that necessary to ordering the drinks. (Wash.) State v. Strodemier, 1012.

3. **JURY TRIAL.—Affidavits to Show that the Misconduct of a Juror did not Result in Prejudice** are not admissible on an application for a new trial. (Wash.) State v. Strodemier, 1012.

See Trial.

JUSTICE OF PEACE.

1. **JUSTICE OF PEACE.—The Owner of an Equitable Title** may sue in a justice's court, although a justice has no power to administer equity. (N. C.) Walker v. Miller, 805.

2. **MARRIED WOMEN.—A Judgment by a Justice of the Peace** entitled "McAfee Estate by Cora McAfee, Agent, against W. A. Gregg and wife Addie Gregg," and docketed in the superior court, is not void because of the defect of parties plaintiff, or because it appears in the summons that at the time it was filled out the defendant Addie was then married. (Ala.) McAfee v. Gregg, 854.

3. **MARRIED WOMEN.—It is not True that a Justice's Court** has no jurisdiction, in any case, of a married woman. She may be sued in that court for a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her after marriage as a free trader. (N. C.) McAfee v. Gregg, 854.

LANDLORD AND TENANT.

1. **TRESPASSING CHILDREN, Landlord's Liability for Injuries Suffered by.**—One who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon after knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom, even though a trespasser. (Minn.) Mattson v. Minnesota etc. R. R. Co., 483.

2. **APARTMENT HOUSES, Duties of Owners of.**—Where a house having several apartments is let to different families, the owner is bound to contemplate all ordinary and reasonable purposes for which the different parts of the house may be used, and if he wishes to restrict the occupancy of the porches by tenants and their children, it is just and reasonable to require him to bring home his restrictions to such persons. (Minn.) Widing v. Penn Mutual Life Ins. Co., 471.

3. **APARTMENT HOUSE—Liability of Owner to Children Injured While Playing on the Porches.**—If a house contains several sets of apartments which are rented and occupied by different families, a child of one of such families playing on a porch of the building, though the apartments occupied by her parents do not adjoin such porch, is not a trespasser, and where the landlord has for several years permitted the children of his tenants to play on the porches of his building, he is liable for injuries suffered by such a child through a defect in such porch of which he had notice. (Minn.) Widing v. Penn Mutual Life Ins. Co., 471.

4. **LANDLORD'S LIABILITY for Condition of Stairway in Apartment House.**—Where a landlord rents apartments in a building to several families separately, but retains the possession or control of the passageways and stairways for the common use of the tenants and those having occasion to visit them, he is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has thus invited others to make of them. (N. J. L.) Siggins v. McGill, 666.

See Adjoining Owners, 7.

LATERAL SUPPORT.

See Adjoining Owners.

LAW.

LAW—Whether Inflexible.—A Law, however wise and just in its general application, is not of such an inflexible character that it will always be applied regardless of circumstances. (Mo.) Russell v. Sharp, 496.

LIBEL AND SLANDER.

See Insane Persons, 1.

LICENSES.

1. **LICENSE—Revocability.**—A parol sale of standing timber is only a license to enter, cut and remove it, and such license may be revoked so that acts done thereafter on the land by the licensee may constitute a trespass. (N. H.) Hodsdon v. Kennett, 607.

2. **LICENSE—Revocation by Death.**—A parol license to enter land and cut timber standing thereon is revoked by the death of the grantor of such license. (N. H.) Hodsdon v. Kennett, 607.

See Mechanic's Lien.

LIEN.

See Banks and Banking, 5-7; Mechanic's Lien.

LIFE ESTATES.

1. **LIFE TENANCY—Payment of Charge on Estate.**—If a tenant for life pays a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute, but his right to preserve and enforce the lien exists for the purpose of reimbursement or contribution only, and so far as his estate or interest is concerned, in the absence of intervening interests or special circumstances making such result inequitable, the lien thereon is extinguished, and a subsequent

assignment of the whole charge is, in substance, the creation of a new encumbrance. (Neb.) Downing v. Hartshorn, 550.

2. **LIFE TENANCY—Payment of Encumbrance—Homestead.**—If a husband holding a life estate in property of a former wife marries again and continues to occupy the premises as a homestead while it is subject to a mortgage, which he pays, taking an assignment, and he subsequently reassigns the mortgage to a third person as security for a new debt, without his wife joining therein, such mortgage is not enforceable against his life estate. (Neb.) Downing v. Hartshorn, 550.

3. **LIFE TENANCY—Payment of Outstanding Encumbrance and Assignment Thereof—Right of Assignee Against Reversioner.**—The rule that a life tenant who buys in an outstanding encumbrance is regarded as holding it for the benefit of the reversioner, as well as for his own benefit, means only that he will not be permitted to acquire by adverse title through such purchase, or otherwise cut out the reversioner's right of contribution, without affording the latter an opportunity to redeem, and such rule does not prevent the life tenant from assigning the paid-off encumbrance to a third person and its enforcement by him against the reversioner, to the extent of his proportion, or the subjection of the property to the satisfaction of such part of the encumbrance in default of its payment otherwise. (Neb.) Downing v. Hartshorn, 550.

See Remainders.

LIMITATION OF ACTIONS.

1. **LIMITATIONS OF ACTIONS, Retrospective Operation of.—Statutes of Limitations Affect** the remedy, and are to be applied retrospectively. Therefore, a statute purporting to limit the time within which an action may be maintained to recover property sold at an administrator's or guardian's sale applies to sales made before its enactment. (Minn.) Brown v. Pinkerton, 448.

2. **LIMITATIONS OF ACTIONS Applicable to Guardian's Sale, What Sale Within the Protection of.**—Under a statute providing that no action for the recovery of any real estate sold by a guardian shall be maintained unless commenced within five years next after the termination of the guardianship, it is not necessary for the sale to have been valid or legal to be entitled to the protection of the statute, but it is sufficient that there were a license and a confirmation of the sale by the probate court, followed by a conveyance executed by the grantor as guardian. It is not material that the agreement to pay for the land sold was to pay for it in wheat at the market price, or that the conveyance executed by the guardian did not refer to the source of his authority or recite any of the proceedings by virtue of which he supposed himself authorized to act. (Minn.) Brown v. Pinkerton, 448.

3. **LIMITATION OF ACTIONS as Against Mortgagees.**—Where a mortgagor conveys real property, his grantee takes subject to the mortgage, and a statute of limitations does not run against the mortgagee until the mortgage is due and can be foreclosed. (Wash.) Thornley v. Andrews, 983.

4. **LIMITATION OF ACTIONS—Trespass by Canal Construction.** In North Carolina, an action for permanent damages to real property occasioned by a canal company in widening and deepening its canal and throwing earth upon the premises of the plaintiff is barred in three years; the five-year statute of that state applies only to rail-

road companies. (N. C.) Cherry v. Lake Drummond Canal etc. Co., 850.

See Adverse Possession; Banks and Banking, 4.

Note.

Limitation of Actions. See Statutes of Limitation.

LIS PENDENS.

1. **LIS PENDENS—Money Judgment.**—The pendency of a bill in equity filed by an heir at law for the removal of the administration of the estate into chancery for the purpose of a settlement of a special administration and distribution among the heirs, and not seeking to fix any lien, charge or encumbrance on the land, and on which an ordinary money decree is rendered, is not a lis pendens, affecting the title to land sold under execution issued on the decree rendered. (Ala.) Moragne v. Doe, 52.

2. **LIS PENDENS—Money Judgment.**—An action brought solely for the recovery of a money judgment, or for other relief, not directly affecting property, will not constitute a lis pendens, and, in the absence of fraud or collusion between the parties thereto, alienations are valid until the property is affixed with a judgment or execution lien, or taken into custody by an attachment, receivership, or other auxiliary proceeding. (Ala.) Moragne v. Doe, 52.

3. **LIS PENDENS—Essentials.**—Two things are indispensable to give the doctrine of lis pendens effect. One is, that the litigation must be about some specific thing which must necessarily be affected by the termination of the suit, and the other is, that the particular property involved must be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril. (Ala.) Moragne v. Doe, 52.

LIVESTOCK.

See Carriers, 15-33.

MAIL.

See Postoffice.

MANDAMUS.

1. **MANDAMUS, Appeal, Where not an Adequate Remedy.**—If a court having no jurisdiction to do so directs a change of venue to another county, the fact that any judgment which might be rendered in the court to which the transfer is made could be revised on appeal does not constitute an adequate remedy, and mandamus may issue to compel the court making the order of transfer to try the action. (Wash.) State v. Superior Court, 915.

2. **MANDAMUS Will not Issue Against an Irrigation Company to Compel It to Furnish Water** to the applicant as provided in a private contract entered into between him and it, because he has an adequate remedy under his contract. (Wash.) State v. Washington Irrigation Co., 1019.

Note.

Manufacturers, acceptance of articles by person for whom they were made, when exempts from liability for defects in, 712.
concealed defects, liability to third persons for injuries due to, 709.

Manufacturers, contracts of, liability to third persons upon, 704, 705.
deceit by, actionable, what amounts to, 708.
defect in things manufactured, liability to third persons for, 708.
fraud for which liable, 708.
hidden defects, liability for, 708.
implied warranty of, respecting articles sold, 705.
liability to third persons, classification of, 702.
liability to third persons whom they know will use the articles sold, 705.
negligence and carelessness, liability to third persons for, 702.
of dangerous articles, liability for the sale of, 705.
of dangerous articles, must anticipate that they will come to and be used by third persons, 706.
of defective machinery, when not liable to third persons injured by, 710.
of drugs, liability of, to third persons, 713.
of explosives, liability to third persons, 716.
of foods, liability of, to third persons, 714.
of machinery, liability to third persons, 715.
selling dangerous articles to a person not knowing them to be dangerous, 711.

MARRIAGE.

1. **VOID MARRIAGE—Removal of Impediment.**—If a woman contracts a second marriage in the belief that her first husband is dead, when in fact he is not, but subsequently she obtains a divorce from him, after which she and her second husband continue, as before, to live together as husband and wife, with the intention of being such, an actual marriage is established. (N. J. Eq.) Chamberlain v. Chamberlain, 658.

2. **ALIMONY in a Wife's Suit to Annul Her Marriage** in an action by a wife against her husband to annul her marriage on the ground that he was insane when it was contracted, the court has no power to grant alimony and counsel fees pendente lite. (N. Y.) Jones v. Brinsmade, 746.

MARRIED WOMEN.

See Acknowledgments; Adverse Possession, 3; Justices of Peace, 2, 3.

MASTER AND SERVANT.

Statutes for Protection of Employés —Assumption of Risks.

1. **MASTER AND SERVANT, Provisions of Statute in Favor of the Latter, When cannot be Waived.**—If a statute provides that every person operating a factory where machinery is used shall provide and maintain in use proper belt shifters or other contrivances for the purpose of throwing on or off belts on pulleys, an operative working in the factory, with knowledge that such shifters have not been procured and are not in use, does not assume the risk of their absence. He cannot waive this provision of the statute intended for his protection. (Wash.) Whelan v. Washington Lumber Co., 1006.

2. **NEGLIGENCE in Failing to Perform Duty Imposed by Statute.** The owner of a factory who fails to comply with the provisions of a statute requiring him to provide and maintain in use belt shifters is guilty of negligence per se. (Wash.) Whelan v. Washington etc. Co., 1006.

3. **STATUTES—Factory Act—Belt Shifters.**—A statute requiring the owners of factories to establish and maintain in use proper belt shifters or other mechanical devices for throwing on and off

belts on pulleys requires such shifters in all cases, and the question should rarely, if ever, be left to the jury to determine whether such a shifter was a necessary and practicable device at the place in question. (Wash.) Whelan v. Washington etc. Co., 1006.

4. **MASTER AND SERVANT—Belt Shifters, Assuming Risks of Absence of.**—If there is evidence before the jury that a belt shifter or like mechanical device could have been maintained in use at the place in question, and also evidence to the contrary, and the jury is instructed that if they find from a fair preponderance of the evidence that proper belt shifters could have been provided and maintained in use without substantial interference with the use and operation of the machinery, and that they were not provided and maintained, they should find for the plaintiff, unless he contributed to his own injury by negligence or recklessness, a judgment in favor of the plaintiff should not be reversed on the ground that he assumed the risk resulting from the absence of such shifters. (Wash.) Whelan v. Washington etc. Co., 1006.

Independent Contractors.

5. **CONTRACTORS, INDEPENDENT, Who are.**—The general test which determines the relation of an independent contractor is that he shall exercise an independent employment and represent his employer only as to the result of his work, and not as to the means whereby it is accomplished. The chief consideration is that the employer has no right of control as to the mode of doing the work, but the reservation to the employer of the right to supervise the work for the purpose merely of determining whether it is being done in accordance with the contract, does not affect the independence of the relation. (Wash.) Larson v. American Bridge Co., 904.

6. **CONTRACTOR, Independent Subcontractors, When are.**—Where the means by which a work is to be accomplished are entirely under the control of a subcontractor, and the latter employs servants who aid in the construction of the work, and where the original contractor is not shown to have been negligent in the selection of the subcontractor or in furnishing defective material or otherwise, the subcontractor becomes an independent contractor, and his employer is not liable for injuries arising from the former's negligence. (Wash.) Larson v. American Bridge Co., 904.

7. **MASTER AND SERVANT, Original Contractor and Servants of Independent Contractors.**—In the case of employés, the relation of master and servant does not exist between the original contractor and those engaged upon the work as employés of an independent contractor. (Wash.) Larson v. American Bridge Co., 904.

See Theaters and Shows, 5.

MECHANIC'S LIEN.

1. **MECHANICS' LIENS, Materials, Explosives, Whether are.**—Dynamite furnished to a railroad contractor to be used, and actually used, in breaking up frozen earth, so that it can be handled by a steam shovel in grading and building the roadbed, is material furnished for the improvement of real property, and a lien may be claimed and enforced therefor. (N. Y.) Schaghticoke Powder Co. v. Greenwich etc. Ry. Co., 751.

2. **MECHANICS' LIEN Against Railways.**—A lien may be acquired against a railway corporation for materials furnished and used in the construction of its roadbed. (N. Y.) Schaghticoke Powder Co. v. Greenwich etc. Ry. Co., 751.

Note.
Mining Corporations, implied power of to borrow money, 317.

MONOPOLY.

See Conspiracy.

MORTGAGES.

1. **MORTGAGE OR DEED.—In Determining Whether a Deed is a Mortgage, the Principal Test** to be applied is whether the relation of the parties toward each other of debtor and creditor continued after the execution of the deed. (Wash.) Plummer v. Ilse, 997.

2. **MORTGAGE Accompanied by a Deed in Escrow.**—If, when a loan is secured, a promissory note is given therefor and a mortgage to secure its payment, and a deed is also executed by the mortgagor and given to a third person, to be delivered to the mortgagee in case default should be made in the payment of the note when due, and default being made, such deed is delivered accordingly, the whole transaction amounts to a mortgage only, and the mortgagor's right or redemption is not cut off by the delivery of such deed. (Wash.) Plummer v. Ilse, 997.

3. **A MORTGAGE Conveys No Title to Real Estate in Washington.** The property mortgaged is merely held as security for the debt. (Wash.) Thornley v. Andrews, 983.

4. **MORTGAGE.—Once a Mortgage Always a Mortgage** is a well-established rule of equity. A deed intended as a mortgage will remain a mortgage until the equity of redemption is cut off, and the parties cannot by stipulation, however express or positive, render it anything else. (Wash.) Plummer v. Ilse, 997.

5. **MORTGAGE—Right of Redemption cannot be Cut Off by Default.**—It is impossible in equity for the contracting parties in a single transaction by the execution of one or more written instruments to create the relation of debtor and creditor and mortgagor and mortgagee, and at the same time to provide for a conditional sale or the destruction of the mortgagor's right of redemption on default. (Wash.) Plummer v. Ilse, 997.

6. **MORTGAGE, Election to Treat as Due, When Irrevocable.**—If a mortgage stipulates that upon default in the payment of interest, or any part thereof, the principal sum, with all arrears of interest, shall, at the option of the mortgagee, become and be due and payable immediately, and he elects to exercise such option, the election is irrevocable, and he cannot subsequently rescind it and refuse to receive payment of the mortgage debt. (N. Y.) Kilpatrick v. Germania Life Ins. Co., 722.

7. **LIENS—Priority—Burden of Proof.**—If a judgment creditor alleges priority of his judgment lien over that of a mortgage, and that the mortgagee had actual knowledge of the judgment, the burden of proof is on the judgment creditor to show that the mortgagee had such knowledge. (Iowa) Boyd v. Boyd, 215.

8. **POSSESSION—Rents and Profits.**—A prior lienholder in possession of land is accountable for rents and profits in favor of a holder of a subordinate encumbrance. (Ala.) New England Mortgage Security Co. v. Fry, 62.

9. **MORTGAGE LIENS—Subrogation.**—If a prior mortgage lien is paid with money loaned for that purpose, the mortgage given to secure such loan may be enforced against equities which would otherwise be superior to it, but this rule of subrogation cannot be extended to a third mortgagee, with notice of such equities, who advances the money to pay off the second mortgage. (Ala.) New England Mortgage Security Co. v. Fry, 62.

10. **CHARGE ON ESTATE—Payment—Preservation of Lien.**—A mortgage or other charge upon an entire estate may be kept alive as to the individual estate or interest of the person paying it off by taking an assignment by which he makes his intention manifest, but if the preservation of the lien as to such estate or interest would operate fraudulently or inequitably, it will not be permitted, and the lien will be deemed extinguished so far as it covered, and as to the proportion chargeable upon, the individual estate or interest of the person paying it off, notwithstanding the assignment. (Neb.) Downing v. Hartshorn, 550.

11. **MORTGAGE.—The Assignment of a Mortgage is a Conveyance** within the meaning of a statute providing that every conveyance by mortgage, deed, or otherwise, of real estate shall be recorded in the office of the register of deeds, and if not so recorded, shall be void as against any purchaser in good faith and for a valuable consideration. (Minn.) Huitink v. Thompson, 476.

12. **MORTGAGE, UNRECORDED, Assignment of, Effect of as Against Purchaser Under Foreclosure by the Assignor.**—If a mortgagee assigns the mortgage, and nevertheless subsequently proceeds to foreclose it, and at the foreclosure sale the property is purchased by one having no notice of such assignment, it not being filed for record, he acquires a title to the property, as against the assignee. (Minn.) Huitink v. Thompson, 476.

See Adverse Possession, 2; Chattel Mortgages; Life Estates; Limitation of Actions, 3; Names; Payment, 3; Remainder, 5.

MUNICIPAL CORPORATIONS.

Powers of Municipality.

1. **MUNICIPAL CORPORATIONS.—Powers Conferred** upon a municipality by an independent and original act, such as the power to buy and sell liquor, are powers conferred by its charter. (Ala.) Equitable Loan etc. Co. v. Edwardsville, 34.

2. **MUNICIPAL CORPORATIONS—Ordinances—General Powers.** The difficulty of making specific enumeration of all such powers as the legislature may intend to delegate to municipal corporations renders it necessary to confer some power in general terms. (Fla.) Porter v. Vinzant, 93.

3. **MUNICIPAL CORPORATIONS—General Powers.**—The general powers usually given to municipal corporations are designed to confer other powers than those specifically enumerated. (Fla.) Porter v. Vinzant, 93.

4. **MUNICIPAL CORPORATIONS have Only Such Powers as** are conferred upon them by express legislation or by necessary implication from those expressly given. (Fla.) Porter v. Vinzant, 93.

5. **MUNICIPAL CORPORATIONS.—General Powers** conferred upon municipal corporations are to be construed with reference to the purposes of the incorporation. (Fla.) Porter v. Vinzant, 93.

Power to Make Particular Regulation.

6. **CONSTITUTIONAL LAW—Billboard Ordinance.**—A city ordinance limiting the height of signs and billboards to eight feet and requiring them to be constructed not less than ten feet from the street line is a regulation not reasonably necessary to the public safety and not justifiable as an exercise of the police power. (N. J. L.) Passaic v. Paterson Bill Posting etc. Co., 676.

7. **CONSTITUTIONAL LAW—Building Permit—Arbitrary Power of City Council.**—An ordinance declaring that if any person shall "erect any structure or building, within the city limits, without the consent of the common council," which will be "greatly injurious to adjacent property, and destroy the comfort, convenience, peace and reasonable enjoyment of adjacent residents, the same shall constitute a nuisance," and he shall be punished by fine, and the structure removed by the police at the cost of the owner, is unconstitutional as conferring arbitrary power upon the city council. (Ky.) Boyd v. Board of Council, 240.

8. **MUNICIPAL CORPORATIONS—Ordinances—Cruelty to Animals.**—Authority to pass ordinances against cruelty to animals is among the powers which may properly be conferred upon municipal corporations, and such authority may be included in powers given in general terms, where there is nothing in the enumeration of the particular powers conferred to limit the operation of the general welfare clause in their charters. (Fla.) Porter v. Vinzant, 93.

9. **MUNICIPAL CORPORATIONS—Water-pipes—Police Power.**—A water-pipe under the roadbed of a public street is not an appendage to or a part of the abutting land, and the owner of the property cannot be required by a police regulation, to lay such pipe. (N. J. L.) Doughten v. Camden, 680.

Assessments for Public Improvements.

See Corporations, 2, 3.

10. **MUNICIPAL CORPORATIONS—Assessment for Improvements.**—An arbitrary assessment for local public improvements, not based upon or limited to benefits conferred, is invalid. (N. J. L.) Doughten v. Camden, 680.

11. **MUNICIPAL CORPORATIONS—Enforcement of Special Tax—Presumptions.**—The burden is on a city seeking to enforce a special tax to show that all the proceedings made essential by the statute, leading up to the special assessment, have been strictly followed. There is no presumption coming to the aid of the city which seeks to enforce the lien of a special tax. (Neb.) Trephagen v. City of South Omaha, 570.

12. **MUNICIPAL CORPORATIONS—Power to Levy Assessments.** Without legislative enactment, no city, or other municipal corporation, has any right to levy a tax or assessment upon the property of its citizens. (Neb.) Trephagen v. City of South Omaha, 570.

13. **MUNICIPAL CORPORATIONS—Assessment of Water-pipes.** The imposition upon abutting property of a specified sum per front foot for the expense of laying water-pipes in the street by a city cannot be supported under the power of general taxation, nor under the power to tax property benefited by a public improvement because of the benefits but not in excess thereof. (N. J. L.) Doughten v. Camden, 680.

Garbage Tax.

14. **MUNICIPAL CORPORATIONS—Garbage Tax.**—Without legislative authority, a city has no power to assess and levy a special garbage tax and make it a specific charge upon the real property of a citizen. (Neb.) Trephagen v. City of South Omaha, 570.

Liability for Negligence—Light Plant.

15. **MUNICIPAL CORPORATIONS—Liability for Negligence.**—In so far as municipal corporations are engaged in the discharge

of powers and duties imposed upon them by the legislature as governmental agencies of the state, they are not liable for a breach of duty by their officers, for in that respect the officers are the agents of the state although selected by the municipality; but when municipalities are acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable for the negligence of their servants, agents, or officers, whether the latter are individuals or corporations. (N. C.) Fisher v. New Bern, 857.

16. **MUNICIPAL CORPORATIONS—Negligence in Operating Light Plant.**—Where a city, through a commission established for that purpose, operates an electric light plant to furnish lights for its streets and also for private consumers, it is responsible for the negligence of the commission in managing the plant, which results in the death of a person coming in contact with a live wire. (N. C.) Fisher v. New Bern, 857.

Execution Against Property of City.

17. **MUNICIPAL CORPORATIONS—Execution Against Property of.**—Municipal corporations are created for public, governmental and political purposes, and all property of whatever nature held by them in trust for carrying out such purposes is exempt from seizure and sale under execution; but the private property of a municipality, held for purposes of income or sale, unconnected with any governmental use or function may be levied on and sold to satisfy a judgment. (Ala.) Equitable Loan etc. Co. v. Edwardsville, 34.

See Intoxicating Liquors.

NAMES.

IDEM SONANS—Constructive Notice—One who takes a mortgage on land, in the name of the owner as shown by the record title cannot be charged with constructive notice of a judgment against the mortgagor under a different name, although the pronunciation of both names—the one being "Sheffey" and the other "Cheffey"—may be the same. In such case the mortgage is the paramount lien. (Iowa.) Boyd v. Boyd, 215.

NEGLIGENCE.

In General.

1. **NEGLIGENCE—Dangerous Acts—Public Duty.**—Where one undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. (N. J. L.) Guinn v. Delaware etc. Tel. Co., 668.

2. **NEGLIGENCE—Pleading.—Demurrer** is not the proper remedy for getting rid of improper items of special acts of alleged negligence, where the declaration makes a case entitling the plaintiff to any recovery whatever, even though it is only nominal damages. (Fla.) Western Union Tel. Co. v. Wells, 129.

3. **EVIDENCE.—Complaints of His Sufferings Made by an Injured Person** are admissible in evidence. (Ind. App.) Indianapolis Street Ry. Co. v. Haverstick, 163.

4. **EVIDENCE in Personal Injury Cases—Payment of Doctor's Bill.**—It is not material, in a personal injury case, whether the plain-

tiff has paid all or a part only of his doctor's bill. (Ind. App.) Indianapolis Street Ry. Co. v. Haverstick, 163.

5. **NEGLIGENCE, CONTRIBUTORY, What is not.**—An act done, or the failure to act, under such circumstances that a person of ordinary care, caution and prudence would not apprehend danger therefrom, is not such an act, or failure to act, as in law amounts to contributory negligence. (Ind. App.) Indianapolis Street Ry. Co. v. Haverstick, 163.

Proximate Cause.

6. **NEGLIGENCE—Proximate Cause.—Independent Acts** of a responsible person intervening between the defendant's negligence and the injury sustained, break the causal connection between the negligence and the damage, and he who is guilty of the original negligence is not chargeable, but redress must be had from him who directly caused the injury, unless the intervening act is such as might reasonably be anticipated as the natural and probable result of the original cause. (Ky.) Georgetown Tel. Co. v. McCullough, 294.

7. **NEGLIGENCE—Proximate Cause—Injury from Explosive.**—If a telephone company rents two rooms in a building, using one of them as an operating-room, and the other as a storeroom, where it has some dynamite stored, and the owner of the building employs a carpenter to put up a partition next to such storeroom, in doing which he or his assistant necessarily removes the dynamite and places it in the hallway near such operating-room, where from some unknown cause it is exploded, injuring an employé of the telephone company in the operating-room, the company is not liable for the injury, as the proximate cause thereof was the negligence of the carpenter or his assistant in placing the dynamite where he did, and not the negligence of the company in placing it in its storeroom. (Ky.) Georgetown Tel. Co. v. McCullough, 294.

Dangerous Premises.

8. **TRESPASSING CHILDREN, Liability for Injuries to by Dynamite.**—One who keeps or leaves dynamite on his premises, where children have, to his knowledge or that of his servants, been in the habit of loitering and amusing themselves, is liable for damages to them due to their taking possession of the dynamite and being injured by its explosion. (Minn.) Mattson v. Minnesota etc. R. R. Co., 483.

9. **TRESPASSERS are Bound to Take the Premises on Which They Go as They are,** and the owner is not in duty bound to go beyond the obligations which arise from actual or implied duties to provide a reasonably safe place for intruders or licensees. (Minn.) Widing v. Penn Mutual Life Ins. Co., 471.

Imputed Negligence.

10. **NEGLIGENCE OF PARENT—Imputing to His Child.**—The contributory negligence of his father is not imputable to a child non sui juris, and the latter may recover for injuries due to the negligence of another, although the father of the child was guilty of contributory negligence. (Minn.) Mattson v. Minnesota etc. R. R. Co., 483.

11. **NEGLIGENCE OF CARRIER not Imputable to Passenger.**—The negligence of a carrier is not imputable to a passenger who is injured by the concurrent negligence of the carrier and another, and

he may recover against both. (Ky.) Louisville etc. Mail Co. v. Barnes, 273.

See Electricity; Sales, 2, 3.

Note.

Negligence, duty to person injured is essential to liability to him for, 701.
gross, what is, 711.
in acts imminently dangerous to the lives of others, 702.
of the seller or manufacturer of articles, acceptance by purchaser of, whether terminates liability of for, 712.
of the seller or manufacturer of articles, third persons injured by, when may recover for, 713.
of the seller or manufacturer of drugs, liability to third persons, 713.
willful, what is, 711.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. **NEW TRIAL.—Whether Justice Requires** that a new trial be had upon the ground of newly discovered evidence is a question of fact for the trial court. (N. H.) State v. Danforth, 600.

2. **NEW TRIAL.**—Evidence which simply tends to impeach a witness for the state and does not go to the merits of the case does not authorize the court to order a new trial. (N. H.) State v. Danforth, 600.

3. **NEW TRIAL.—Newly Discovered Evidence** to justify a new trial must be material to the issue joined and to the point to be decided by the verdict and not collateral. It must go to the merits of the case, and not to discredit or impeach a former witness. (N. H.) State v. Danforth, 600.

4. **NEW TRIAL—Newly Discovered Evidence.**—Before a new trial can be granted on the ground of newly discovered evidence, it must appear that due diligence was exercised to procure such evidence upon the original trial, and that it was through no fault or neglect of the party making the application that such evidence was not then produced. (Neb.) Grand Lodge A. O. U. W. v. Bartes, 577.

5. **NEW TRIAL on Account of Excessive Damages, Discretion of the Court.**—Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or a verdict should be reduced, rests in the sound discretion of the trial court, in the review of which the appellate court will be guided by the general rule applicable to other discretionary orders. (Minn.) Mohr v. Williams, 462.

NUISANCE.

1. **NUISANCE—Negro Church.—The Common Council of a city** cannot declare a church, which is being erected by a negro congregation, a nuisance, on the ground that worship therein will be noisy and disagreeable to neighboring residents. (Ky.) Boyd v. Board of Council, 240.

2. **NUISANCE.—The Operation of a Shooting-gallery and a Tonophone and an Orchestrion** constitutes a nuisance which will be restrained at the instance of a hotel-keeper if it has driven away several of his guests, and, if continued, will drive away the balance. (Wash.) Grantham v. Gibson, 1003.

3. **NUISANCE—Holder of Leasehold Interest, Whether Entitled to Injunction.**—One who is the holder of a leasehold interest only is entitled to an injunction to restrain the continuance of a nuisance if it works an injury to his business as lessee and not an injury to the freehold, and an action for damages would not afford adequate relief. (Wash.) Grantham v. Gibson, 1003.

OFFICERS.

1. **OFFICERS—Failure to Take Oath.**—Although a person chosen as temporary clerk of a city council does not take an oath of office, this does not invalidate the proceedings of the meeting of the council. (N. H.) Attorney General v. Remick, 594.

2. **OFFICERS—Removal—Vacancy.**—If a city council has power to elect a city clerk and remove him at pleasure, a vote of the council declaring a vacancy in such office operates as a removal therefrom, when it is the apparent intention to remove the incumbent. (N. H.) Attorney General v. Remick, 594.

OPTIONS.

See Vendor and Vendee, 5-7.

PARDONS.

1. **PARDONS—Compliance With Conditions.**—If a criminal accepts a pardon he accepts it subject to all its valid conditions and limitations, and will be held bound to a compliance therewith. (Fla.) Ex parte Alvarez, 102.

2. **PARDONS—Conditions Complied With.**—If a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions thereof, the effect of the pardon becomes the same as though it were by its terms full and absolute. (Fla.) Ex parte Alvarez, 102.

3. **PARDONS—Revocation.**—Before delivery and acceptance, a pardon may be revoked by the officer or body granting it; but if the pardon is not void in its inception, it cannot be revoked for any cause after its delivery and acceptance are complete. It then becomes a valid and operative act, of the benefits of which the recipient can be deprived only by some appropriate legal proceeding. (Fla.) Ex parte Alvarez, 102.

4. **PARDONS—Violation of Conditions.**—If a prisoner has accepted a conditional pardon, and been released from imprisonment by virtue thereof, but has violated, or failed to perform, the condition, or conditions, or any of them, the pardon, in case of a condition precedent, does not take effect, and in case of a condition subsequent, becomes void, and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or as much thereof as he has not suffered at the time of his release. (Fla.) Ex parte Alvarez, 102.

5. **PARDONS — Conditions — Acceptance.**—Sometimes conditional pardons expressly provide that upon violation of the condition the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence, and such stipulation, upon acceptance of the pardon, becomes binding upon the convict, and authorizes his arrest and recommitment upon the terms imposed, and in the manner and by and through the official authority as stipulated in the pardon. (Fla.) Ex parte Alvarez, 102.

6. **PARDONS—Violation of Conditions.**—If a convict has been released under a conditional pardon, his rearrest and recommitment to his original sentence cannot be had upon the mere order of the pardoning power alone, unless such course is provided by statute or by the express terms of the pardon. (Fla.) Ex parte Alvarez, 102.

7. **PARDONS—Conditional—Right to Hearing.**—The convict, receiving a conditional pardon, upon his rearrest for a violation of its conditions is entitled to a hearing before some court of general criminal jurisdiction, in order that he may show that he has performed the conditions of the pardon, or that he has a legal excuse for not having done so, or that he is not the same person who was convicted, and on such a hearing the court may, in its discretion, take the verdict of a jury as to the facts involved. But the criminal is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted. Such inquiry is preferably to be held before the court that originally tried and convicted the criminal, but may properly be had before any court of the state of general jurisdiction. (Fla.) Ex parte Alvarez, 102.

8. **PARDONS—Breach of Condition—Prosecution by Indictment.** Unless the act constituting the violation of a condition in a pardon is in itself a criminal offense, the violation of the condition is not ground for a prosecution by indictment. (Fla.) Ex parte Alvarez, 102.

9. **PARDONS—Breach of Condition—Procedure.**—A proceeding to test the question whether there has been a breach of the conditions of a pardon is purely informal, and the established practice is for some court of general jurisdiction, upon having its attention called, by affidavit or otherwise, to the fact that a pardoned convict has violated, or failed to comply with, the conditions of his pardon, to issue a rule, reciting the original judgment of conviction, and sentence, the pardon and its conditions, and the alleged violation of, or noncompliance with the conditions thereof, and requiring the sheriff to arrest the convict and bring him before the court, to show cause why the original sentence imposed upon him should not be executed. A copy of such rule should be served upon the convict at the time of his arrest, and when brought before the court upon such rule, if the prisoner denies that he is the same person who was convicted, sentenced and pardoned, he is entitled to have a jury summarily impaneled to try such issue, but if his identity is not denied, all the other facts and issues can be heard and tried by the court alone, unless the latter shall see proper, for his own satisfaction, to submit the facts to a jury for determination, and if it be found upon such investigation that there has been no violation of the conditions of the pardon, or if the convict shall show to the satisfaction of the court some valid excuse for such violation, he should be discharged from custody; but if the violation of the conditions of the pardon is established to the satisfaction of the court without any valid excuse therefor, the convict should be remanded to custody and ordered to have the original sentence imposed upon him duly executed, or so much thereof as has not already been suffered by him. Such inquiry and proceedings may properly be had by habeas corpus. (Fla.) Ex parte Alvarez, 102.

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PARENT AND CHILD.

1. **PARENT AND CHILD—Custody of Children.**—The father alone has power to appoint a testamentary guardian for his child by last will and testament, or by deed. No such power is conferred upon the mother from any source. (Fla.) Hernandez v. Thomas, 137.

2. **PARENT AND CHILD—Contracts for Custody of Children.**—Contracts by parents for the transfer to others of the custody of their children are against public policy, and generally are not enforceable or binding. (Fla.) Hernandez v. Thomas, 137.

3. **PARENT AND CHILD—Custody of Children.**—While in awarding the custody of children, the paramount consideration is their welfare, rather than the technical legal right of the parent, yet the courts should not lightly and without good cause invade the natural right of the parent to the custody, control and care of his infant child. (Fla.) Hernandez v. Thomas, 137.

4. **PARENT AND CHILD—Religious Training.**—The father of infant children, when there is no sufficient cause for depriving him of the right, has the legal right to their custody and control and the right to have them educated in any religious faith that he sees proper whose tenets do not inculcate violation of the laws of the land. (Fla.) Hernandez v. Thomas, 137.

5. **PARENT AND CHILD—Father Entitled to Custody of Children.**—As against strangers, the father, however poor and humble, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. In such case it is not enough to consider the interests of the child alone. (Fla.) Hernandez v. Thomas, 137.

6. **PARENT AND CHILD—Custody of Children.**—As between father and mother, or other near relative of the child, where sympathies of the tenderest nature may be confidentially relied upon, the father is generally preferred as the custodian of his child. (Fla.) Hernandez v. Thomas, 137.

See Fraudulent Conveyances; Gifts.

PARLIAMENTARY LAW.

1. **PARLIAMENTARY LAW—Presiding Officers.**—The nature and extent of the authority of a city mayor as presiding officer of its council can only be determined by such principles of parliamentary usage as are generally adopted or observed in deliberative assemblies, and which are reasonably essential to the due execution of the legitimate business of the council. (N. H.) Attorney General v. Remick, 594.

2. **PARLIAMENTARY LAW—Power of Presiding Officer.**—The power of the mayor of a city as presiding officer of its council is not absolute and original, but qualified and derivative. It is his duty to declare the will of the body over which he presides, ascertained by rules previously adopted, or in the absence of such valid rules, by other methods not repugnant to the due and orderly procedure of a deliberative body. (N. H.) Attorney General v. Remick, 594.

3. **PARLIAMENTARY LAW—Presiding Officers—Power to Adjourn Meeting.**—The presiding officer of a legislative assembly has no power to arbitrarily declare an adjournment of a meeting thereof, without the consent of a majority of the members, unless he has exhausted all his legitimate powers for preserving order before declaring the adjournment, or unless the meeting is in such a state of disorder and excitement that the transaction of business is impracticable. (N. H.) Attorney General v. Remick, 594.

4. **PARLIAMENTARY LAW—Illegally Adjourned Meeting—Power of Remaining Members.**—If a meeting of a city council is illegally adjourned by its presiding officer, who withdraws, a quorum of the members of the council may elect a chairman and temporary clerk for that meeting, and proceed with the transaction of such business as the counsel is authorized to transact. (N. H.) Attorney General v. Remick, 594.

PARTIES.

1. **PARTIES.—A Court may Direct, at any Time,** before or after judgment, that other persons be made parties, to the end that substantial justice be done. (N. C.) Walker v. Miller, 805.

2. **ESTOPPEL—Defect of Parties.**—A plaintiff cannot complain of a defect of parties in a counterclaim, if the record shows that the omitted party, who was also omitted by him, is equally necessary to a determination of his own cause of action. (Neb.) First Nat. Bank v. Avery Planter Co., 541.

3. **EQUITY JURISDICTION—Parties.**—A court of equity has power to allow necessary parties complainant or defendant to be added at any time before the final decree is entered. (Fla.) Camp Phosphate Co. v. Anderson, 77.

See Equity, 3.

PARTITION.

1. **PARTITION—Final and Appealable Decree.**—A decree in a partition suit adjudicating the rights and interests of the respective parties, ordering and appointing commissioners to make partition, according to the respective rights and interests of the parties as therein determined, is not a final, but an interlocutory, decree; but a decree in such a suit ordering a sale of the property by the commissioners, based upon their report that partition cannot be made without great prejudice to the owners of the lands, is final and appealable. (Fla.) Camp Phosphate Co. v. Anderson, 77.

2. **PARTITION—Pleading—Place of Residence.**—An allegation in a bill for partition that "according to the best knowledge and belief of your orator, the name and place of residence of" a defendant named as a corporation "is as follows, Camp Phosphate Company, which is a Florida corporation," is a sufficient compliance with the provisions of the statute requiring the bill to state the name and place of residence of the defendant according to the best of the knowledge and belief of the complainant. (Fla.) Camp Phosphate Co. v. Anderson, 77.

3. **PARTITION—Pleading—Sufficiency.**—If a bill for partition alleges that the land sought to be partitioned was conveyed by United States patent to a person named; that such person subsequently died, leaving certain named heirs at law who inherited the property; that certain of such heirs conveyed their interest by deed to complainant, and that others conveyed their interest by deed to the defendant; that complainant and defendant are in possession, claiming title by virtue of the deeds from such heirs which set forth the proportionate shares held by such parties, and other facts from which the court can see, as a matter of law, that the parties are cotenants, it is sufficient to entitle complainant to maintain his suit and is not subject to demurrer. (Fla.) Camp Phosphate Co. v. Anderson, 77.

4. **PARTITION—Outstanding Title.**—If complainant and defendant in partition claim title to undivided interests through the heirs of a former owner, defendant cannot set up an outstanding title, in a third person not in possession, derived from such former owner, and with which title he does not connect himself. (Fla.) Camp Phosphate Co. v. Anderson, 77.

5. **PARTITION—Ouster—Adverse Possession.**—Under the Florida statute courts of equity have authority to entertain bills for partition, though one of the joint owners has ousted the other, or claims under a legal title adversely, or disputes the other's right or title to the possession. (Fla.) Camp Phosphate Co. v. Anderson, 77.

6. **PARTITION—Ejectment.**—An action for partition cannot be used as a substitute for the action of ejectment, nor for the sole purpose of testing a legal title. (Fla.) Camp Phosphate Co. v. Anderson, 77.

7. **PARTITION—Adjudication of Legal Controversies.**—Under the Florida statute, whenever the case is one properly for partition between the common owners of lands, one or more of whom are complainants, and the others are defendants, all controversies between them as to the legal title and right to possession may, and should be, settled by the chancellor. (Fla.) Camp Phosphate Co. v. Anderson, 77.

8. **PARTITION—Parties.**—In a suit for partition the rights of parties cannot be adjudicated, when they are not properly before the court. (Fla.) Camp Phosphate Co. v. Anderson, 77.

9. **PARTITION—Parties.**—A decree in partition adjudicating that complainant and defendant are each owners of certain undivided interests in the land sought to be partitioned, but reserving for future adjudication the right, title and interest of the defendant to a certain other undivided interest, the legal title to which is in a third person, not a party to the suit, is erroneous, even though the decree states that it appears from the evidence that the defendant is in equity entitled to a conveyance from such third person. (Fla.) Camp Phosphate Co. v. Anderson, 77.

See Jury, 1.

PARTNERSHIP.

1. **PARTNERSHIP.—The Death of a Partner, in the absence of** a stipulation in the articles to the contrary, works an immediate dissolution of the partnership, and the title to its assets vests in the surviving partners, impressed with a trust to close up the firm business, pay the debts, and turn over to his personal representative the share of the deceased partner. (N. C.) Walker v. Miller, 805.

2. **PARTNERSHIP—Deed Naming Firm as Grantee.**—If a member of a partnership has died, but the firm name has been perpetuated and the business continued by others, a deed which names such partnership as grantee is open to explanation by parol evidence and may be given effect. (N. C.) Walker v. Miller, 805.

3. **PARTNERSHIP—Sale and Division of Firm Property.**—Partners may, during the partnership, convert partnership property into separate property, or separate into partnership property, and such property will, upon dissolution of the firm, be held to possess that character which is thus impressed upon it. Or one partner may purchase the interest of all his copartners in the firm property, and thereafter the creditors of the firm can claim no preference over the individual creditors of the purchaser in the application of the property to the payment of debts. (Iowa) First National Bank v. Brubaker, 209.

4. **PARTNERSHIP—Sale and Division of Firm Property.**—A sale by each partner in a firm, acting separately and on his own terms, of his interest in the firm property constitutes a division thereof, and the validity of the transfer does not depend upon the consent of the remaining member or members of the firm. (Iowa) First National Bank v. Brubaker, 209.

5. **PARTNERSHIP—Authority of One Partner to Bind the Firm by a Wrongful Act.**—One of several partners cannot draw the firm or his copartners into a trespass by giving authority for the doing of an unlawful act in the name of the firm; for one partner has no power to bind the firm as to the commission of a wrongful act without the previous consent or subsequent concurrence of all the partners. (Md.) Bernheimer Bros. v. Becker, 356.

6. **PARTNERSHIP, When not Liable for an Arrest.**—If a partnership is engaged in the keeping of a department store, and one of the partners authorizes or ratifies the arrest of a customer on the charge of stealing an article of goods for sale in such store, the firm and the other copartners are not liable for such arrest if they do not previously authorize nor subsequently ratify it. (Md.) Bernheimer Bros. v. Becker, 356.

7. **PARTNERSHIP—Ratification by a Partner of an Unlawful Arrest When not Shown.**—When a customer in a department store is wrongfully arrested on a charge of stealing an article for sale therein, a partner who is not present at the arrest and not in any way connected with it, who, on being complained to by the husband of the person arrested, orders him out of the store, does not thereby show concurrence in, or ratification of, the wrongful act so as to make himself answerable therefor. (Md.) Bernheimer Bros. v. Becker, 356.

PAYMENT.

1. **PAYMENTS—Application of.**—Payments and credits on an account, in the absence of any agreement or direction for their application elsewhere, should be applied to the satisfaction of those

items or claims which are earliest in point of time. (Iowa) Ida County Savings Bank v. Seidensticker, 189.

2. **EVIDENCE—Burden of Proof.—The Plea of Payment and Settlement** tenders an affirmative issue, and the burden of proof must be assumed by the party interposing the plea. (Ind. App.) Indianapolis Street Ry. Co. v. Haverstick, 163.

3. **PAYMENT BY MORTGAGOR, When Involuntary and Hence Recoverable.**—If a mortgagee of real property refuses to accept payment of a debt and release of the mortgage unless paid a bonus to which he is not entitled, and the mortgagor, though protesting, pays the debt with such bonus, such payment is not involuntary, but is made under duress, and an action may be maintained against the mortgagee to recover the amount of such bonus. (N. Y.) Kilpatrick v. Germania Life Ins. Co., 722.

PERPETUITIES.

See Annuities; Wills, 2.

PHYSICIANS AND SURGEONS.

1. **PHYSICIANS, Agreement with Purporting to be with a Nonexisting Medical Institution.**—An agreement purporting to be made by a state medical institute, it being owned, operated and controlled by one L., must be regarded as his personal agreement, and is void if it is for the performance of medical services which he is incompetent to perform, and cannot perform without violating the laws of the state. (Wash.) Deaton v. Lawson, 922.

2. **CONTRACT in Violation of the Laws of a State.**—An agreement to perform services as a physician by a person not licensed to practice as such, and which he could not perform without violating the laws of the state, is against the public policy and void. (Wash.) Deaton v. Lawson, 922.

3. **PHYSICIANS, Assignability of Contracts of.**—A contract to render personal services as a physician is nonassignable, and no other person can perform or tender performance of it without the consent of the other contractor. (Wash.) Deaton v. Lawson, 922.

4. **PHYSICIANS AND SURGEONS, Consent Necessary to Operation by.**—Ordinarily a patient must be consulted and his consent given before a physician can operate upon him. (Minn.) Mohr v. Williams, 462.

5. **PHYSICIANS AND SURGEON—Consent to Operation, When Implied.**—If a person is injured to the extent of unconsciousness, and his injuries are of such a nature as to require prompt surgical attention, a physician is justified in applying such medical or surgical treatment as may be reasonably necessary for the preservation of life or limb, and the consent on the part of the injured person is implied. So, if in the course of an operation to which the patient had consented, a physician should discover conditions not anticipated before the operation was commenced and which, if not remedied, endangered the life or health of the patient, such physician would, though no express consent was given, be justified in extending the operation to remove and overcome them. (Minn.) Mohr v. Williams, 462.

6. **PHYSICIAN AND SURGEON—Consent to Operation, When not Implied.**—If a patient consenting to an operation on the right ear is placed under an anesthetic for that purpose, and the operating physician discovers and concludes that the operation upon that

ear is not necessary, but that the left ear ought to be operated upon, and thereupon he operates upon it, instead of the right ear, there is no implied consent to the operation, and the patient may recover therefor. (Minn.) Mohr v. Williams, 462.

7. **PHYSICIAN AND SURGEON—Consent to Operation by Family Physician, When does not Bind Patient.**—The fact that the family physician is present when a patient is put under an anesthetic for the purpose of undergoing an operation by another physician, and is then informed by the operating physician that the intended operation is not necessary, but that another and different operation is, and makes no objection thereto, does not establish the implied consent of the patient to the latter operation. Whether, under such circumstances, the operation was consented to is a question of fact for the jury. (Minn.) Mohr v. Williams, 462.

See Assault and Battery.

PLEADING.

PLEADING—Amendment After Evidence Closed.—An amendment to a pleading which does not change substantially the claim or defense may, in a proper case, be allowed to be made even after the evidence is closed, but this is not always a confidence inspiring practice. (Mo.) Russell v. Sharp, 496.

POLICE POWER.

See Constitutional Law.

POSTOFFICE.

NOTICE OF NONDELIVERY of Registered Mail, When Must be Taken.—As the rules of the postoffice department prescribe that, upon receipt of registered mail, the addressee must sign a receipt, which must be immediately mailed to the sender, his failure to receive such receipt is notice to him that such mail has not been delivered. (Ind. App.) Carr v. First National Bank, 159.

See Evidence.

PRINCIPAL AND AGENT.

1. **EVIDENCE.—The Declarations of an Alleged Agent** are not admissible to prove his agency. (Wash.) Larson v. American Bridge Co., 904.

2. **PRINCIPAL AND AGENT—Knowledge of Agent—Fraud.**—The principal is not charged with the knowledge of his agent when the latter is engaged in committing an independent, fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. (N. H.) Brookhouse v. Union Pub. Co., 623.

3. **PRINCIPAL AND AGENT—Knowledge of Agent.**—The principal in an insurance policy is chargeable with the knowledge of his agent of the terms of the contract made for him by such agent. (N. H.) Johnson v. Maryland Casualty Co., 609.

4. **PRINCIPAL AND AGENT.**—Although a mortgagee agrees to rely on an abstract of title prepared by the agent of the mortgagor, this does not make him the agent of the mortgagee also, so as to charge the latter with the agents' uncommunicated knowledge of defects in the title. (Iowa) Boyd v. Boyd, 215.

PRINCIPAL AND SURETY.

OFFICIAL BONDS—Cashier's Bond—Liability of Sureties.—A cashier's bond which does not expressly limit the period of its operation must be read in connection with the terms of the appointment under which he holds his office, and if such appointment is for a definite period, the bond ceases to be effective upon the expiration of the term so designated. (Iowa) County Sav. Bank v. Seidensticker, 189.

PROBATE MATTERS.

See Executors and Administrators; Wills.

PROHIBITION, WRIT OF.

1. **PROHIBITION, Writs of, Adequacy of Remedy by Appeal as a Bar to.**—The adequacy of the remedy by appeal or in the ordinary course of law is the test to be applied in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction, and the adequacy of the remedy by appeal does not depend on the mere question of delay or expense. (Wash.) State v. Superior Court, 925.

2. **PROHIBITION, Writs of to Enforce Right to a Change of Venue.**—If an application is made for a change of the place of trial, supported by proper and sufficient affidavits, and the court denies it, a writ of prohibition will not issue to prevent the court from proceeding with the trial of the cause. The remedy by appeal is adequate. (Wash.) State v. Superior Court, 925.

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PUBLIC LANDS.

1. **HOMESTEAD Under Federal Laws—Interest of Divorced Wife.** If, while a husband and wife reside on public lands and he has a preferential right to make a homestead entry thereon when they shall be surveyed, she is granted a divorce from him, she does not have any right in such lands entitling her to an interest therein on their being patented to him on his compliance with the homestead laws. (Wash.) Hall v. Hall, 1016.

2. **GOVERNMENT HOMESTEADS—Exemptions.**—One who makes a homestead entry on government land and then commutes his entry and pays to the United States government the minimum price for the land, and obtains a patent therefor, does not thereby abandon his homestead and convert such entry into a pre-emption. The homestead thus acquired is exempt from execution sale the same as though the homesteader had resided upon the land and cultivated it for the statutory period. (Iowa) McCorkell v. Herron, 201.

3. **GOVERNMENT HOMESTEADS—Exemptions—Abandonment.** A homestead acquired by entry on government land is forever exempt from liability for debts of the grantee, contracted prior to the acquisition of the homestead, and there can be no such abandonment of the homestead as will destroy such exemption. This is true, although the patentee conveys the land and afterward reacquires the title. (Iowa.) McCorkell v. Herron, 201.

4. **ESTOPPEL BY DEED.—Recitals in Patents to Government Lands** do not operate as an estoppel against the grantee and in favor of a stranger to the title. Erroneous recitals in such patents are not binding on the grantees therein. (Iowa) McCorkell v. Herron, 201.

QUANTUM MERUIT.

See Contracts, 3.

RAILWAYS.

1. **RAILWAYS—Trunk Lines—Franchise.**—An electric railroad company authorized to carry freight and passengers between two cities in different states and all intermediate points is a "trunk railway," within the meaning of a constitutional provision that municipalities shall not grant franchises to street railways and other enumerated corporations, except to the highest and best bidder, but that such provisions "shall not apply to a trunk railway." (Ky.) Diebold v. Kentucky Traction Co., 230.

2. **RAILWAYS—Definition of "Trunk Railway."**—A "trunk railway" is a commercial railway whose main line, whether operated by steam, electricity or any other motive power, connects towns, cities, counties or other points within the state or in different states, and has the legal capacity, under its charter or the general law, of constructing, purchasing and operating branch lines or feeders connecting with its main stem or trunk, the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river to its tributaries. (Ky.) Diebold v. Kentucky Traction Co., 230.

3. **CONTRACTS FOR COMMISSIONS, What is not.**—A contract, the effect of which may be to pledge the gross receipts of a railway corporation from any source, cannot be regarded as a commission or rebate from the gross receipts, though so styled by the parties to the

contract. (Md.) West Maryland R. R. Co. v. Blue Ridge Hotel Co., 362.

4. **RAILWAY CORPORATION—Power of to Run a Summer Hotel.** A corporation empowered by its charter to construct a railway between specified points, together with all buildings, stations, and other works and accommodations necessary and convenient and to aid any other company in the construction of its road by means of subscriptions to its capital stock or otherwise, and to consolidate with any corporation owning a railroad or railroads and other property, has no power to engage directly in the construction and operation of a summer hotel, or to lend its credit to any corporation engaged therein. (Md.) West Maryland R. R. Co. v. Blue Ridge Hotel Co., 362.

See Carriers.

RAPE.

1. **EVIDENCE—Exhibiting Infant to Show Paternity.**—On a trial for rape, a child whose paternity is in controversy may be exhibited to the jury, and counsel may properly direct attention to features peculiar to both the infant and the defendant, and to a general resemblance between them. (N. H.) State v. Danforth, 600.

2. **EVIDENCE—Paternity—Comparison of Child with Putative Father.**—The question whether the evidence furnished by a comparison of a child with its putative father is sufficiently definite to have weight upon the issue of paternity in a particular case, is a question of remoteness determinable by the trial court. (N. H.) State v. Danforth, 600.

RECORDS.

RECORD as Constructive Notice.—The record of a deed or mortgage is notice to subsequent purchasers or encumbrancers, but not to prior ones. (Ala.) New England Mortgage Security Co. v. Fry, 62.

See Chattel Mortgages, 1; Mortgages, 12.

RELATIONSHIP.

See Incest, 2.

RELEASE.

RELEASE of One Joint Tort-feasor as Release of All.—A release of one joint tort-feasor, upon his making part satisfaction only, does not discharge the others, except pro tanto. (Ky.) Louisville etc. Mail Co. v. Barnes, 273.

Note.

Release, of joint tort-feasor, whether may reserve the right to pursue the others, 282-287.

REMAINDERS.

Vested or Contingent.

1. **REMAINDERS—Whether Contingent or Vested.**—If land is devised to a daughter for life, to go, after her death, to her "children and the children of such as are dead," and, while the life tenant is still living, one of her children dies, the children of such decedent have merely a contingent remainder. (N. C.) Latham v. Roanoke R. R. etc. Co., 764.

2. **A REMAINDER IS VESTED** in children where property is devised to their mother for life in trust for the use and benefit of herself and children. (Md.) Roberts v. Roberts, 344.

3. **REMAINDER, When not Made Contingent by Power of Sale.** When property is devised to a mother for life in trust for the use and benefit of herself and children, the fact that she is given the power to sell the real estate and invest the proceeds, and also power to lease, does not show an intention of the testator to create a contingent instead of a vested remainder. Nor can it be said that the power to use so much of the principal as may be necessary for the support of herself and children or for their education and advancement in life made the remainder contingent. (Md.) Roberts v. Roberts, 344.

4. **POWER OF DEPOSITION, When Does not Create a Fee or Prevent the Vesting of a Remainder.**—There may be a devise to one for life, with power of disposition, which will not affect the remainder over unless the power is exercised as authorized, and as to any part of the estate upon which the power is not exercised, the remainder is unaffected. Nor is a devise converted into a contingent remainder because the testator in his will speaks of property remaining after the death of the life tenant. The uncertainty whether the power will be exercised does not make the remainder contingent. (Md.) Roberts v. Roberts, 344.

5. **REMAINDER, When not Contingent.**—A devise to a person for the payment of debts and legacies is not contingent until they are paid, but confers an immediately vested estate. (Md.) Roberts v. Roberts, 344.

Conveyances and Mortgages.

6. **A CONVEYANCE OR DEED of Trust of All the Real and Personal Estate of the Grantors,** wheresoever situate, sufficiently describes the property conveyed and includes their vested remainder in real property. (Md.) Roberts v. Roberts, 344.

7. **CONVEYANCE IN TRUST by Grantors, when Includes Their Individual as Well as Their Joint Property.—A Deed of Trust Executed by a Husband and Wife** reciting that they are indebted to sundry persons, and, being unable to pay in full, they propose to assign all their property in trust for their creditors, and purporting to assign all their property in trust to the grantees, with authority to convert it into money and apply the proceeds to the payment of their creditors, passes the individual as well as the joint estate of both grantors, and, as to the wife, is not restricted to her rights of dower, but includes a vested remainder in real estate which is her separate property. (Md.) Roberts v. Roberts, 344.

8. **A VESTED REMAINDER** can be Mortgaged and Conveyed, and is liable to execution. (Md.) Roberts v. Roberts, 344.

Waste and Injuries.

9. **REMAINDERMEN.—Where There has been a Trespass** on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or the reversion can maintain an action for the wrong done to his estate and interest. (N. C.) Cherry v. Lake Drummond Canal etc. Co., 850.

10. **REMAINDERMEN—Injury to Inheritance—Parties Plaintiff.** When a remainder or reversion is held by co-owners, and an action is brought by one of them, the defendant may by demurrer require all persons so interested to be joined; but by filing a general denial

he waives any defect of parties, and the plaintiff, upon showing permanent injury to the inheritance, may recover the full amount of damage done to his interest. (N. C.) Cherry v. Lake Drummond Canal etc. Co., 850.

11. **VESTED REMAINDERMEN—Remedies Against Waste.**—The owner of an inheritance, either by way of reversion or vested remainder, may sue for waste and recover the damage to the inheritance. (N. C.) Latham v. Roanoke R. R. etc. Co., 764.

12. **CONTINGENT REMAINDERMEN—Remedies Against Waste.** One entitled to a contingent remainder cannot maintain an action to recover damages for waste, such as the cutting of timber, but he may have his interest in the timber protected by an injunction. (N. C.) Latham v. Roanoke R. R. etc. Co., 764.

See Life Estates.

RESTRAINT OF TRADE.

See Conspiracy.

REVERSIONERS.

See Life Estate, 3; Remainders.

RUBBER STAMP.

See Bills and Notes, 1.

SALES.

1. **SALES IN BULK STATUTE—Construction of.**—The sale of the horses, harnesses, carriages and other property in a livery stable does not fall within the statute providing that it shall be the duty of every person who shall purchase a stock of goods, wares or merchandise in bulk to demand and receive of the vendor a verified statement of the names and addresses of all his creditors and the amount due, or to become due, to each. (Wash.) Everett Produce Co. v. Smith Bros., 979.

2. **MANUFACTURERS—Liability to Third Persons Injured by Fraudulently Concealed Defects.**—If they who manufacture a farm roller for the purpose of sale intentionally put in a tongue which is unfit for the purpose, because it is made of cross-grained timber and has a knot in it and also a large knot hole, and conceal this hole by a plug of wood nailed in, and then cover up the knot, the hole, and the cross-grain of the wood with putty and paint, so that these defects cannot be seen, they are liable to a third person who purchases the roller of their vendees and is injured by its breaking when in use, through these defects. (N. Y.) Kuelling v. Lean Mfg. Co., 691.

3. **VENDOR OF ARTICLES Damaged Because of Known Defects, Liability of.**—One who sells an article knowing it to be dangerous by reason of a concealed defect is guilty of a wrong without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers injury by reason of his willful and fraudulent deceit and concealment. (N. Y.) Kuelling v. Lean Mfg. Co., 691.

4. **CONTRACTS, When Sufficiently Mutual.**—A contract for a specified amount of glass, leaving the privilege to the party purchasing to change sizes from those specified or to cancel in an emergency such portion of the order as has not been taken in work by the other

party, is not void for want of mutuality. (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

5. **CONTRACT, Right to Cancel in an Emergency, Meaning of.**—A contract for glass, leaving the purchaser the right to cancel "in the event of an emergency," does not confer an arbitrary right of cancellation, but only in some unforeseen event or condition of circumstances, which, considering the character of the business, would furnish a substantial reason for canceling the contract. (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

6. **A CONTRACT is not Voidable Because One of the Parties has the Right to Cancel** in the event of a decline in prices, if the other party declines to meet such price. In the absence of such decline, the contract is enforceable. (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

7. **A CONTRACT is not Voidable for Want of Mutuality** because one of the parties is bound to order the goods only as his requirements demand. If he needs the goods he is not at liberty to procure them elsewhere. (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

8. **CONTRACT to Furnish Goods to Another.**—An offer to furnish goods as they may be ordered is binding to the extent of orders made before any withdrawal of the offer. (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

9. **CONTRACTS—Parol Evidence Respecting the Meaning of the Word "Currently."**—Where a party contracts to take goods currently, parol evidence is admissible of a conversation between the parties at or before entering into the contract concerning the word "currently." (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

10. **DAMAGES for Breaches of Contracts of Sale.**—Where a party who agrees to furnish goods notifies the buyer that they will not be furnished, and the latter thereupon procures them as soon as he can at the market price, he may recover as his damages the difference between such price and the price for which he had originally purchased them. (Ind. App.) Semon Bache & Co. v. Coppes etc. Co., 171.

Note.

Savings Banks, implied power of, to borrow money, 318.

SETOFF.

SETOFF may or may not be Pleaded at the election of the defendant, and unless pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense of another action by the same plaintiff is not affected or impaired by a judgment against the defendant. (Ala.) New England Mortgage Security Co. v. Fry, 62.

Note.

Setoff, bankers, right of, as against funds on general deposit, 420.

SPECIFIC PERFORMANCE.

See Corporations, 20.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

Note.
Statutes of Limitation, cannot apply to actions already commenced, 461.
construction of statutes with respect to their retrospective operation, 459.
date of enactment, when apply from that only, 460.
foreign judgments, statutes which unreasonably limit the time for bringing actions upon, 458.
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prescription, title by, cannot be destroyed by statute, 456.
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reasonable time within which to bring actions, cases illustrating, 458, 459.
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retrospective statutes, cannot destroy title by prescription, 456.
retrospective statutes, power of the legislature to enact, 456.
retrospective statutes, removing the bar of, 456.
retrospective statutes, restrictions upon the power to enact, 456.
retrospective statutes, unreasonably shortening the time to bring actions, 457.

STATUTES.

STATUTES, Repeal and Re-enactment of.—If there is an express repeal of an existing statute and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes, so far as it goes, the repeal, and the portion continued is entitled to be treated as the law during the entire period of both statutes. (Minn.) Brown v. Pinkerton, 448.

STREET RAILWAYS.

See Carriers, 7-12.

STRIKES.

See Injunctions, 7-9.

SUBROGATION.

1. **SUBROGATION by Mortgagee.**—Where a man who has contracted a secret marriage executes a mortgage in which his wife does not join, and the proceeds of the loan are in part used to take up two valid existing mortgages on the property, the mortgagee will be subrogated to the liens of the former mortgages, and the wife is entitled to dower only in the surplus over and above the reinstated mortgage. (Mich.) Hall v. Marshall, 404.

2. **LIENS—Subrogation.—Subordinate Lienholders** cannot avail themselves of the right of subrogation to a prior lien discharged by them without offering to recognize the rights and equities of a prior lienholder. (Ala.) New England Mortgage Security Co. v. Fry, 62.

See Deeds, 2; Mortgage, 9.

SURETYSHIP.

See Principal and Surety.

TAXATION.

Educational Institutions.

1. **TAXATION—What is an Educational Institution.**—A gymnastic association where regular gymnastic exercises are taught and a teacher in physical culture constantly employed is an institution of education, within the meaning of a constitutional provision exempting institutions of education from taxation. (Ky.) German Gymnastic Assn. v. Louisville, 287.

Situs of Property.

2. **TAXATION OF CORPORATION—Situs of Property.**—Under a statute which declares that the property of a corporation is taxable "where its office is located in its articles of incorporation," provided its business is actually transacted in such office, but that if it establishes its principal office at any other place than the one named in the articles, then the place where it transacts its principal business is to be deemed its residence for purposes of taxation, the residence of a corporation for the purpose of taxation is at the place where its principal business, such as receiving and paying out its funds, is conducted, and not at the place named as its office in its articles of incorporation, when the only business there transacted is the annual meeting of the stockholders. (Mich.) Teagan Transportation Co. v. Board of Assessors, 391.

3. **TAXATION OF CORPORATION—Situs of Property—Uniformity.**—A statute which provides that the personal property of all corporations engaging in maritime commerce or navigation shall be assessed only in the city, village or township which is stated in their articles of incorporataion to be the location of their general office for business, confers on such corporations the special privilege of determining the situs of their property for purposes of taxation, and violates the constitutional provision requiring a uniform rule of taxation. (Mich.) Teagan Transportation Co. v. Board of Assessors, 391.

4. **TAXATION—Situs of Property—Rule of Uniformity.**—The legislature, in determining the situs of personal property for purposes of taxation, must regard the constitutional requirement of uniformity. (Mich.) Teagan Transportation Co. v. Board of Assessors, 391.

Tax Sales and Deeds.

5. **TAX SALES—Description.**—Though a statute provides that a tax deed shall be prima facie evidence of the regularity of the sale of the premises described, and of the regularity of all prior proceedings, and of good and valid title in the grantee, such deed cannot establish title in him, if in the sale or conveyance the description was so imperfect that it failed to describe the land sold with reasonable certainty. (Ind. App.) Green v. McGrew, 149.

6. **TAX SALE—Description, Insufficient not Made Valid by Long Use.**—If the description in all the papers, books and advertisements of the taxing officers prior to the execution of a deed are radically insufficient, the mere fact that those officers so employed the description for a number of years does not cure it of its inadequacy for the purpose of the tax deed. (Ind. App.) Green v. McGrew, 149.

7. **TAX DEEDS, Descriptions in Differences Between and Deeds Between Private Persons.**—In the matter of the description of real estate there is, between conveyances executed by owners and tax deeds made by officers, an important difference. Faulty description in the conveyance of an owner may serve because of the intention of the parties relating to the particular estate so conveyed, but in

the case of a tax deed mere intention cannot be thus effectual, as mutual mistake will not cure an insufficient description. (Ind. App.) Green v. McGrew, 149.

8. **TAX SALES, Imperfect Descriptions in Prior Proceedings not Made Good by Perfect Description in the Deed.**—If in the papers, books, and proceedings relating to the assessment and the advertisement and sale of property for delinquent taxes, the descriptions employed are inadequate, the proceeding cannot be given validity by inserting a sufficient description in the tax deed. (Ind. App.) Green v. McGrew, 149.

9. **TAX SALES.—The Maxim, "De Minimis Non Curat Lex,"** if applicable to tax sales, should be applied with caution. (Ind. App.) Green v. McGrew, 149.

10. **TAX SALES—Including Amount not Chargeable.**—If the sum of six cents is purposely and erroneously added as a penalty, and the property is sold for eight cents more than chargeable against it, the sale is void. (Ind. App.) Green v. McGrew, 149.

11. **TAX DEEDS, When not Evidence of Title.**—A tax deed not witnessed by the county treasurer, as required by statute, is not prima facie evidence of title. (Ind. App.) Green v. McGrew, 149.

12. **TAX DEED, Findings Required to Support.**—To support a tax deed, the special findings should show that it was signed, witnessed and acknowledged by the persons required by statute. (Ind. App.) Green v. McGrew, 149.

13. **TAX SALES—Lien for Taxes Under Void Deed Passes to the Purchaser.**—Though a tax deed does not pass the title to the grantee, he may thereby acquire the lien of the state and be entitled to the compensation provided by statute for his outlays. (Ind. App.) Green v. McGrew, 149.

See Municipal Corporations, 10-14.

TELEGRAPH COMPANIES.

1. **TELEGRAPH COMPANIES cannot, by Their Negligence,** or willfulness, cause suffering in mind and body to an individual, and then claim to be liable only for a return of the consideration received for correct service. (Fla.) Western Union Tel. Co. v. Wells, 129.

2. **TELEGRAPH COMPANIES — Negligence — Complaint—Sufficiency.**—A complaint alleging the willful refusal of a telegraph company to pay money in its hands to which plaintiff was entitled, with full knowledge that he would thereby be compelled to travel without food for more than twenty-four hours, states a good cause of action, and a bona fide claim, within the jurisdiction of the court, though the money withheld is below the jurisdictional amount. (Fla.) Western Union Tel. Co. v. Wells, 129.

3. **TELEGRAPH COMPANIES—Negligence.**—After suit brought against a telegraph company for refusal to pay over to the payee of a telegraphic order the money named therein, the company is not excused from liability for its negligence by paying the money over to the transmitting bank. (Fla.) Western Union Tel. Co. v. Wells, 129.

4. **TELEGRAPH COMPANIES—Negligence—Damages for Physical Pain and Mental Suffering.**—If the result of the willful refusal, without adequate cause, of a telegraph company, to pay money to one entitled thereto on a telegraphic order causes him to travel for more than thirty-six hours without food or funds, he is entitled to

recover for bodily pain and suffering, and for mental pain and anguish attendant thereon. (Fla.) Western Union Tel. Co. v. Wells, 129.

5. **TELEGRAPH COMPANIES—Statements of Agent—Hearsay Evidence.**—The statement of a receiving clerk and cashier in the main office of a telegraph company concerning matters within the apparent scope of his authority is not hearsay evidence. (Fla.) Western Union Tel. Co. v. Wells, 129.

TENANCY IN COMMON.

1. **COTENANCY—Ouster.**—To constitute ouster by a cotenant there must be some open, notorious assertion of an exclusive claim, and a direct interference with, or denial of, the right of another cotenant. (Ala.) Moragne v. Doe, 52.

2. **COTENANCY—Ouster—Mesne Profits.**—If one cotenant, after ousting his cotenant, rents out mineral rights owned by them, the amount agreed to be paid under the lease forms a proper basis on which to ascertain mesne profits. (Ala.) Moragne v. Doe, 52.

3. **COTENANCY.—Tax Titles Acquired by One Cotenant** inure equally to the benefit of all of the cotenants. (Ala.) Moragne v. Doe, 52.

THEATERS AND SHOWS.

1. **THEATERS AND TICKET SPECULATORS, Effect of Licensing.**—The licensing of theaters and of ticket speculators neither adds to nor takes away from the rights of the parties to the contract when the proprietor of a theater sells the ticket. The rights of the purchaser and the duties of the proprietor are measured by the terms of the contract as in fact made by them. (N. Y.) Collister v. Hayman, 740.

2. **A THEATER TICKET** is a License Issued by the Proprietor pursuant to the contract as convenient evidence of the right of the holder to admission to the theater at the date named, with the privilege specified, subject, however, to his observance of any reasonable condition appearing on the face thereof. The license, though granted for a consideration, is revocable for the violation of such condition by the holder of the ticket in the manner specified therein. (N. Y.) Collister v. Hayman, 740.

3. **THEATERS, Right of to Refuse Admission to Persons Holding Tickets Purchased on the Sidewalk.**—The proprietor of a theater has the right to impose and enforce a regulation that if a ticket is sold on the sidewalk admission on it may be refused at the door. A condition to this effect printed on the ticket is valid, and binds every subsequent purchaser thereof, and a ticket speculator who comes lawfully into possession of a ticket is not entitled to an injunction to prevent the enforcement of the condition. (N. H.) Collister v. Hayman, 740.

4. **THEATERS AND SHOWS—Negligence of Manager.**—If a person, occupying a paid seat in a grand stand erected by an amusement association is injured by the fall of a bottle from an elevated bandstand, an instruction that if ordinary care for the protection of people in the grand stand required that the space between it and the bandstand should have been inclosed with a netting or other barrier, failure to provide it is negligence, and if by reason of such negligence such person was injured, he has the right to recover, sufficiently covers the association's duty to exercise due care in the premises. (Iowa) Williams v. Mineral City Park Assn., 184.

5. **MASTER AND SERVANT.**—Negligence of a servant for which his master must respond to a third person is negligence in some act, or failure to act, within the scope of his employment, and if the members of a band, engaged to furnish music for a public entertainment, while drinking negligently drop a bottle, which injures a person who has paid admission to such entertainment, he cannot recover therefor from the manager of such entertainment. (Iowa) Williams v. Mineral City Park Assn., 184.

6. **THEATERS AND SHOWS—Care Required of Owner or Manager.**—In the erection of buildings, stands, platforms and other elevated structures upon grounds to which the public is invited for amusement, the owner or manager thereof must use reasonable care not to create or permit conditions which endanger persons or visitors who are in their proper place, or in seats provided for their use. (Iowa) Williams v. Mineral City Park Assn., 184.

7. **THEATERS AND SHOWS—Care Required of Owner.**—The undertaking of the proprietor of a place of public amusement for the safety of his patrons is not so similar to that of a common carrier of passengers as to call for an application of the same rule of responsibility. Reasonable care on the part of the former is all that is required. (Iowa) Williams v. Mineral City Park Assn., 184.

TIME.

TIME—Fractional Parts of Days.—The legal fiction that there are no divisions or fractions of a day has no application to transactions between persons, where priority of rights becomes a question of fact. (Ala.) New England Mortgage Security Co. v. Fry, 62.

Note.

Tort, joint, covenanting not to sue one party guilty of, does not release the others, 282.
joint, difference between cases where the injury is to property and those where the injury is to the person or reputation, 286, 287.
joint, release of one of several persons guilty of, is construed as a covenant not to sue, 284.
joint, release of one person guilty of, construction of, 283.
joint, release of one person guilty of, releases all, though not under seal, 283.
joint, release of one person guilty of, whether may reserve the right to pursue the others, 282, 283.
joint, release under seal of one party guilty of, releases all, 282.
joint, satisfaction accepted as in full from one tort-feasor, whether operates as a release of all, 284.
joint, satisfaction in part, from one person guilty of, whether releases all, 285, 286.

TRESPASS.

See Abatement and Revival, 2; Limitation of Actions, 4.

TRESPASSERS.

See Electricity; Negligence.

TRIAL.

In General.

1. **TRIAL—Defenses—Burden of Proof.**—If, in defense to an action, the defendant asserts paramount rights in himself in point of

time, he has the burden of proof to establish them. (Ala.) New England Mortgage Security Co. v. Fry, 62.

2. **JURY TRIAL—Immaterial Error as to the Degree of Proof.**—An instruction to the jury that a specified fact must clearly appear is not misleading nor prejudicially erroneous when other instructions show that it is necessary only that the fact appear by a preponderance of the evidence. (Ind. App.) Indianapolis Street Ry. Co. v. Haverstick, 163.

3. **TRIAL.—A Demurrer to the Evidence** is properly overruled unless it sets forth all the evidence intended to be admitted thereby. (Fla.) Atlantic Coast Line R. R. Co. v. Dexter, 116.

4. **TRIAL—Estoppel, When does not Arise from Submitting Special Issues.**—A request for the submission of special interrogatories to the jury does not estop a party from urging that there was no evidence bearing on the questions respecting which the interrogatories were submitted, where such party had, before making the request, challenged the sufficiency of the evidence on motions for a nonsuit and to direct a verdict in his favor. (Wash.) Larson v. American Bridge Co., 904.

5. **PRACTICE—Special Findings.**—In a special finding all necessary facts must be stated with reasonable certainty, leaving nothing to be supplied by presumption or intendment. (Ind. App.) Green v. McGrew, 149.

Conduct of Counsel.

6. **TRIAL—Remarks of Counsel.**—In an action to recover damages resulting from a conspiracy to injure plaintiff's business as an oil merchant, to which a corporation is one of the parties defendant, remarks of plaintiff's counsel in argument to the jury, expressing his opinion as to the great desire of such corporation to relieve itself of a competitor in the oil business in that vicinity, are competent and legitimate, and not open to objection. (Ky.) Standard Oil Co. v. Doyle, 331.

7. **TRIAL—Improper Conduct of Counsel.**—A finding by the trial court that the trial was not rendered unfair by alleged misconduct of counsel is conclusive. (N. H.) State v. Danforth, 600.

8. **JURY TRIAL—Incorrect Statement of Law by Counsel in Argument.**—If counsel have the right to argue the law to the jury, they must state it correctly, and if they make an incorrect statement, it is the duty of the court, on request, to correct them, and, failing to do so, the adverse party, if defeated, is entitled to a new trial. (Wash.) Fernandis v. Great Northern Ry. Co., 1027.

Instructions.

9. **TRIAL—Instructions.**—If the trial court has stated an undoubted proposition of law in a written instruction, an oral restatement of the proposition by the court, upon the request of the jury for information cannot be so prejudicial as to authorize a reversal. (Ky.) Standard Oil Co. v. Doyle, 331.

10. **JURY TRIAL—Instructions, Immaterial Error in.**—An instruction that, to sustain the plea of compromise and settlement, it must appear that the defendant made a distinct proposition of settlement, which the plaintiff accepted, is not prejudicially erroneous when it appears that the offer was made by the defendant, and the court in another instruction stated to the jury that it made no difference who made such offer. (Ind. App.) Indianapolis Street Ry. Co. v. Haverstick, 163.

11. **TRIAL—Instructions—Appeal.**—If an instruction is right as far as given, and the party complaining fails to call the attention of the trial court to a further proposition urged for the first time on appeal, there is no ground to allege error. (Iowa) Williams v. Mineral City Park Assn., 184.

12. **INSTRUCTIONS.—A Judge is not Obliged to Repeat** his instructions already given, even when specially asked to do so in a prayer. (N. C.) Sprinkle v. Wellborn, 827.

TRUSTS

1. **TRUSTS—Misapplication of Fund—Evidence of Intent.**—If a trustee makes use of the money of his cestui que trust for his own purpose very soon after withdrawing it from a savings bank, and in making use of it pursues his usual habit in the use of private funds, depositing the money in the bank account of a corporation of which he is treasurer, and immediately checking it out for his own private purposes, this is competent evidence upon the question of his intention at the time of withdrawing the money from the savings bank. (N. H.) Brookhouse v. Union Publishing Co., 623.

2. **TRUSTS—Constructive.**—If trust funds are deposited in the bank account of a corporation by the treasurer thereof and used very soon thereafter by him for his private purposes, the corporation is not liable to the beneficial owner for a misappropriation by reason of such mere temporary possession of the fund from which no benefit was derived. (N. H.) Brookhouse v. Union Pub. Co., 623.

3. **TRUSTS—Misappropriation—Liability of Depositary—Notice of Trust.**—The mingling of guardianship funds with private funds in a deposit account with a bank, kept in the guardian's individual name, is not, in itself, unlawful. In such case the form of the paper will not impose upon the bank the duty of seeing to it that the guardianship portion of the account is properly used. The ordinary presumption applies that the guardian is acting in good faith and will make proper use of the money in drawing checks against the deposit, and to charge the bank with liability for a misapplication of the funds it must appear that it had knowledge of the intended misapplication, or of facts which would put it on inquiry. (N. H.) Brookhouse v. Union Pub. Co., 623.

4. **TRUSTS—Misapplication of Funds.—Banks are not Charged** with the duty of supervising the administration of trusts, where in the due course of business they receive checks and drafts payable to, and properly indorsed by, trustees in their trust capacity. (N. H.) Brookhouse v. Union Pub. Co., 623.

5. **TRUSTS—Misappropriation of Fund—Depositary—Notice of Trust.**—If a treasurer of a corporation, who usually utilizes the corporation bank account for his own private business, causes to be deposited therein negotiable paper payable to and indorsed by himself, as guardian, and very soon thereafter misappropriates the money in furtherance of a preconceived scheme, the corporation is not liable for the misappropriation of the trust fund on the ground that it received it with notice of the trust and aided in the wrongful act. (N. H.) Brookhouse v. Union Pub. Co., 623.

See Charities.

VENDOR AND VENDEE.

In General.

1. **VENDOR AND PURCHASER, Respective Rights of.**—Under an executory contract for the sale and purchase of land the vendor

continues, in the strict legal sense, the owner until the purchase price is paid, the vendee holding the equitable title, and the legal title remaining in the vendor as security. (Minn.) Lamm v. Armstrong, 479.

2. **VENDOR AND PURCHASER, Effect of the Assignment by the Vendor of His Contract of Sale.**—If, after a contract in writing has been made for the purchase and sale of real property, the vendor assigns such contract as security for indebtedness due from him to the assignee, the assignment amounts to a transfer of the vendor's lien on the land, and cannot be impaired by the subsequent termination of the contract by the vendor and vendee without the knowledge or consent of the assignee. (Minn.) Lamm v. Armstrong, 479.

Servitude in Favor of Vendor.

3. **VENDOR AND PURCHASER—Servitude in Favor of Vendor.** If the owner of adjoining tracts sells one of them, or if an owner of an entire estate sells a portion thereof, the purchaser takes the tract or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. (Neb.) Znamanacek v. Jelinek, 533.

4. **VENDOR AND PURCHASER—Servitude in Favor of Vendor.** If the owner of two adjoining tracts of land constructs a permanent dam across a stream on one of them, thereby causing the water to overflow a portion of the other, and then sells the latter tract to one having knowledge of the dam and its character, there arises an implied contract that the mutual benefits and servitudes arising from the existence of such dam, shall remain in statu quo. (Neb.) Znamanacek v. Jelinek, 533.

Options to Purchase.

5. **OPTIONS—Assignability of.**—An option to purchase land, until exercised, creates no interest in the premises, and if the right of exercising such an option contained in a lease is limited to the lessee and "no other person," an assignment of the lease does not carry the right to exercise the option. (Iowa) Myers v. Stone, 189.

6. **OPTIONS—Assignment of—Estoppel.**—A landlord under a lease giving the lessee, "but no other person," an option to purchase the leased premises, is not estopped to claim that such option was a mere personal privilege of the lessee, when the assignee of the lease asserting the right to exercise the option was clearly informed before the thing was done by him in reliance thereon that the lessee had no right to assign the lease. (Iowa) Myers v. Stone, 180.

7. **OPTIONS—Assignment of—Estoppel.**—If a lease of a mine requires the lessee to keep the mine and machinery in repair for the full and complete operation of the mine, the placing of a pump and engine therein by an assignee of the lease for the purpose of removing water from the mine does not charge the lessor with notice of the intention of the assignee to insist on an option to purchase contained in the lease, nor estop him from claiming that the option is a personal right to the lessee alone. (Iowa) Myers v. Stone, 189.

See Deeds.

VENUE.

VENUE, Construction of Statute Authorizing Changes of.—Statutes conferring a right to a change of venue are in furtherance

of justice and should be liberally construed so as not to defeat the right. (Wash.) State v. Superior Court, 915.

See Garnishment.

VOTING MACHINES.

See Elections.

WASTE.

See Remainders.

WATER-PIPES.

See Municipal Corporations, 9, 13.

WATERS.

1. **WATERS, SURFACE, Right to Control and Dispose of.**—When an owner improves his land for a purpose for which such land is ordinarily used, doing only what is necessary for that purpose and being guilty of no negligence in the manner of doing it, he is not liable because as an incident to so improving, surface waters accumulate and flow in streams upon the lands of others. (Minn.) Ginter v. St. Mark's Church, 438.

2. **WATERS, SURFACE, Duty not to Injure Neighbors.**—The common law respecting getting rid of surface waters in the improvement of one's premises has been so modified in Minnesota as to require him to so use his own as not unnecessarily or unreasonably to injure his neighbor. (Minn.) Ginter v. St. Mark's Church, 438.

3. **WATERS, SURFACE, Difference Between City Lots and Country Lands.**—Though there is no distinction in the principle applicable to the case of surface water in the country and in the city, there may be a vast difference in the application of the principle. It does not follow because in the country an owner may be permitted to aid surface water on his own field in its exit through the natural channel upon a lower proprietor, thereby enabling a large volume to accumulate in the rainy period, the same thing can be done in thickly settled portions, where improvements are general, and a great drainage system has been provided. (Minn.) Ginter v. St. Mark's Church, 438.

4. **WATERS, Duty in Cities to Drain into Drains and Sewers.**—In a city, the owners of improved property situate adjacent to a drainage or sewer system must connect therewith the water spouts and gutters of their buildings, and are not at liberty to permit the water to be collected and discharged in the public alleys, where it must enter upon and may injure adjoining premises. (Minn.) Ginter v. St. Mark's Church, 438.

WILLS.

Witnesses.

1. **WILLS.—A Witness to a Will may Subscribe** her name by holding the pen while another person does the writing, notwithstanding she is herself able to write. (N. C.) In re Will of Pope, 813.

Estates Created—Trusts—Perpetuities.

2. **WILLS—Devises—Perpetuities.**—A will bequeathing to the testator's children and their heirs forever the use of certain real estate, and providing that if such heirs should cease to exist the property shall go to certain devisees, is void for remoteness, and as

an attempt to create a conditional fee, or an estate in fee tail, and the children mentioned take an absolute fee. (N. H.) Merrill v. American Baptist Missionary Union, 632.

3. **WILLS—Trusts—Construction.**—If a will bequeaths certain real estate to the testator's children and their heirs forever, providing they shall keep the property insured and pay all taxes and claims, and pay annually a certain sum to a specified corporation, and also providing that if at any time all such heirs shall cease to exist, the property shall go to the corporation named, the attempt to create a conditional fee is void and the children take an absolute fee impressed with a trust to pay the annuity specified from the income. (N. H.) Merrill v. American Baptist Missionary Union, 632.

4. **WILLS—Estate Conveyed.**—Under a will by which a testator gives his property to his sister, and provides therein that if she should die without issue and leave any of the property, it shall go to another, the sister takes an absolute fee simple, with full power to sell and convey a perfect title. (Ky.) Galloway v. Durham, 300.

Election of Widow.

5. **WILLS—Election of Widow—Personal Privilege.**—The privilege of a widow to elect whether she will take under a will is purely personal, and does not pass to her legal representative. (N. Y.) Flynn v. McDermott, 687.

6. **ELECTION OF A WIDOW—Effect of Her Death Within the Year.**—If a widow having the right to elect as between a legacy in her husband's will and her right to dower dies within the year in which she is entitled to exercise her election and without making it, the right to the legacy vests in her executor. (N. Y.) Flynn v. McDermott, 687.

7. **WILL—Election of Widow—Effect of Contest of Will by Her.** The commencement of a proceeding by a widow to contest her husband's will is not an election to take dower, if the will is set aside, or to take the devise or bequest under it if it is sustained. Her right of election remains in abeyance, and if she dies within the time in which she is entitled to make her election, the right to the legacy given to her by the will vests in her executor. (N. Y.) Flynn v. McDermott, 687.

Probate and Contest of Will—Nuncupative Will.

8. **WILLS.—A Decree Probating a Will is Void** when the citation was returnable on the day it was issued and was not served on the widow or next of kin of the decedent. (Wash.) Sullivan's Estate, In re, 895.

9. **WILLS.—The Burden of Proving an Alleged Will** is on the proponents, though a void decree has been entered admitting it to probate. (Wash.) Sullivan's Estate, In re, 895.

10. **WILLS, NUNCUPATIVE, Right to Probate of, When not Lost Because of Delay and of a Void Order.**—If an alleged nuncupative will is offered for probate and the testamentary words proved and reduced to writing within six months, and a void order entered purporting to admit the will to probate, the proponent does not lose the right after the lapse of six months of proceeding with the probate of the will and the trial of the contest thereof. (Wash.) Sullivan's Estate, In re, 895.

11. **WILLS—Contest of, Amendment of After the Lapse of a Year.**—If a contest of a will is filed within a year and is struck out for want of proper verification, but with leave to amend, and the petition is amended accordingly and filed, but not until after the

lapse of a year from the date of the order admitting the will to probate, the court does not lose jurisdiction to proceed with the contest. (Wash.) Sullivan's Estate, In re, 895.

12. **WILLS, Contesting After a Year Where Decree Admitting to Probate was Void.**—If a decree admitting a will to probate is void, a contest of the will may be filed more than a year after the entry of such decree. (Wash.) Sullivan's Estate, In re, 895.

13. **WILLS, Contest of, Delay in Caused by Injunction Procured by the Contestant.**—A will contest should not be dismissed for delay in prosecution, though such delay was due to the restraining order of another judicial tribunal, procured at the instance of the contestant. (Wash.) Sullivan's Estate, In re, 895.

See Frauds, Statute of, 4.

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